

VSB INDIGENT DEFENSE TASK FORCE PROPOSES
AMENDMENTS TO VIRGINIA SUPREME COURT RULE 3A:11

The Virginia State Bar's Indigent Defense Task Force proposes amendments to Virginia Supreme Court Rule 3A:11. Rule 3A:11 applies to discovery and inspection of files for prosecutions involving felonies in a circuit court and any misdemeanor brought on direct indictment. The task force proposes that Rule 3A:11 governing criminal discovery in the circuit court should be expanded so that both parties receive more complete information in preparing for trial and making informed plea decisions, so that defendants' rights are better protected, so that the element of unfair surprise is limited, and so that post-trial litigation is minimized. The task force concluded that the recommendations should be considered by the Supreme Court to address needed improvements to the manner in which discovery is conducted in criminal cases in the commonwealth.

New material is noted in the proposed revisions by underlining. Deleted material is denoted by strike-outs. Comments on the proposed revisions follow.

PROPOSED REVISIONS TO CRIMINAL RULE 3A:11

Rule 3A:11. Discovery and Inspection.

(a) *Application of Rule.* This Rule applies to any prosecution for a felony in a circuit court and to any misdemeanor brought on direct indictment. Notwithstanding the provisions of this Rule, the parties to any prosecution are encouraged to agree in writing to a disclosure of more information than is provided by this Rule. The terms of any form of open file discovery shall be defined by the understanding between the parties but shall require the accused to provide notice of alibi and expert witness designation as otherwise provided in this Rule. Open file discovery shall be continuing in nature.

(b) *Discovery by the Accused.*

(1) Upon written motion of an accused a court shall order the Commonwealth's attorney to permit the accused to inspect and copy or photograph any relevant (i) written or recorded statements or confessions made by the accused, or copies thereof, or the substance of any oral statements or confessions made by the accused to any law enforcement officer, the existence of which is known to the attorney for the Commonwealth, and (ii) written reports of autopsies, ballistic tests, fingerprint analyses, handwriting analyses, blood, urine and breath tests, other scientific reports, and written reports of a physical or mental examination of the accused or the alleged victim made in connection with the particular case, or copies thereof, that are known by the Commonwealth's attorney to be within the possession, custody or control of the Commonwealth.

(2) Upon written motion of an accused a court shall order the Commonwealth's attorney to permit the accused to inspect and copy or photograph designated

books, police reports, papers, recordings, documents, tangible objects, buildings or places, or copies or portions thereof, that are within the possession, custody, or control of the Commonwealth, upon a showing that the items sought may be material to the preparation of his or her defense and that the request is reasonable. This subparagraph does not authorize the discovery or inspection of ~~statements made by Commonwealth witnesses or prospective Commonwealth witnesses to agents of the Commonwealth or of reports, memoranda or other internal Commonwealth documents made by agents in connection with the investigation or prosecution of the case, except as provided in clause (ii) of subparagraph (b)(1) of this Rule.~~ The term police reports in this paragraph refers to narrative reports and supplemental reports prepared by law enforcement in their investigation of a case.

(3) Upon indictment, the Commonwealth shall further provide relevant information favorable to the accused as to guilt, punishment, or a preliminary matter, including any material facts that tend to impeach or negatively affect the credibility of the Commonwealth's witnesses.

(4) Nothing in subparagraph (b)(1), (2) or (3) shall preclude the Commonwealth from redacting the identity and address or other similar identifying information of a witness when necessary to protect the safety of that witness or his or her family, unless court ordered to produce said information upon motion of the accused.

(c) Discovery by the Commonwealth. If the court grants relief sought by the accused under clause (ii) of subparagraph (b) (1) or under subparagraph (b) (2) of this Rule, it shall, upon motion of the Commonwealth, condition its order by requiring that:

(1) The accused shall permit the Commonwealth within a reasonable time but not less than ten (10) days before trial or sentencing, as the case may be, to inspect, copy or photograph any written reports of autopsy examinations, ballistic tests, fingerprint, blood, urine and breath analyses, and other scientific tests that may be within the accused's possession, custody or control and which the defense intends to proffer or introduce into evidence at trial or sentencing.

(2) The accused disclose whether he or she intends to introduce evidence to establish an alibi and, if so, that the accused disclose the place at which he or she claims to have been at the time of the commission of the alleged offense, a general description of his or her activities at that time and the names and addresses of any witness who will corroborate said alibi. The accused shall provide notice of alibi to the Commonwealth at least fourteen (14) days before trial.

(3) If the accused intends to rely upon the defense of insanity or feeble-mindedness, the accused shall permit the Commonwealth to inspect, copy or photograph any written reports of physical or mental examination of the accused made in connection with the particular case, provided, however, that no statement made by the accused in the course of an examination provided for by this Rule shall be used by

the Commonwealth in its case-in-chief, whether the examination shall be with or without the consent of the accused.

(d) *Notice and Designation of Expert Testimony.* Whenever the accused, the accused's attorney, or the attorney for the Commonwealth intends to introduce expert opinion testimony at trial, the accused, the accused's attorney, or the attorney for the Commonwealth shall notify the opposing party in writing of such party's intention to present such testimony at least twenty-one (21) days before the trial to include copies of any written reports of the witness, a summary of the proposed expert testimony that describes the witness's opinions and the basis and reasons for those opinions as well as the witness's qualifications and contact information. Either party may supplement his or her designation and notice if the other party's notice requires additional expert witness assistance. Said supplemental designation and notice shall be filed within fourteen (14) days of the original expert witness designation.

(~~de~~) *Time of Motion.* A motion by the accused under this Rule must be made at least ~~10~~ forty-five (45) days before the day fixed for trial. The motion shall include all relief sought under this Rule. A subsequent motion may be made only upon a showing of cause why such motion would be in the interest of justice.

(~~ef~~) *Time, Place and Manner of Discovery and Inspection.* An order granting relief under this Rule shall specify the time, place and manner of making the discovery and inspection permitted and may prescribe such terms and conditions as are just.

(~~fg~~) *Protective Order.* Upon a sufficient showing the court may at any time order that the discovery or inspection be denied, restricted or deferred, or make such other order as is appropriate. Upon motion by the Commonwealth or the accused, the court may permit the ~~Commonwealth~~ moving party to make such showing, in whole or in part, in the form of a written statement to be inspected by the court in camera. If the court denies discovery or inspection following a showing in camera, the entire text of the ~~Commonwealth's~~ written statement shall be sealed and preserved in the records of the court to be made available to the appellate court in the event of an appeal by the accused.

(~~gh~~) *Continuing Duty to Disclose; Failure to Comply.* If, after disposition of a motion filed under this Rule, and before or during trial, counsel or a party discovers additional material previously requested or falling within the scope of an order previously entered, that is subject to discovery or inspection under this Rule, he or she shall promptly notify the other party or his or her counsel or the court of the existence of the additional material. If at any time during the course of the proceedings, it is brought to the attention of the court that a party has failed to comply with this Rule or with an order issued pursuant to this Rule, the court shall order such party to permit the discovery or inspection of materials not previously disclosed, and may grant such other relief as it may deem appropriate.

-----Original Message-----

From: Esther Windmueller [estherwindmueller@gmail.com]

Sent: Thursday, November 01, 2012 08:19 AM Eastern Standard Time

To: Gould, Karen

Subject: Virginia Supreme Court Rule 3A:11

Dear Karen,

Add my name to the list of lawyers that favor expanding discovery in Virginia. There is too much opportunity for ambush in the current system, by both sides. Further the great disparity in how cases are handled between "open file" jurisdictions and those that give only the mandated information results in similarly situated defendants being treated very differently. This is the hallmark of unfairness.

I support an thoughtful review of the system by all stakeholders.

Thanks,

Esther J. Windmueller
VSB 33720



From: Stephanie Cox [<mailto:sgc@frankspicercox.com>]
Sent: Thursday, November 01, 2012 10:43 AM
To: Gould, Karen
Subject: Proposed Amendment to Rule 3A:11

Dear Ms. Gould,

I am very much in favor of the proposed amendment to Rule 3A:11. I practice in an area where most of our prosecutor's offices allow "open file" discovery, however require defense counsel to hand copy police and investigative reports. While I am allowed a photocopy of a scientific test result or my client's written confession, all other information can be reviewed but not copied. I had a murder trial three years ago and it took me 8 hours to hand copy all of the police reports and witness statements that would have taken just a few minutes to copy for me.

As a court appointed attorney for many years, I find this to be a monumental waste of my time and state resources serving no legitimate purpose. I am gratified that this is being addressed with a proposed rule change. I wonder if requiring the discovery motion to be filed 45 days in advance, rather than 10 days, is necessary. Perhaps 30 days would be more realistic.

Stephanie G. Cox
Frank, Spicer & Cox, P.C.
504 South Main Street
Blacksburg, Virginia 24060
(540) 552-0007
(540) 951-5139 Fax

NOTICE OF CONFIDENTIALITY

The information contained in and transmitted with this e-mail electronic transmission is subject to the Attorney-Client Privilege, Attorney work product, and/or Confidential. It is intended only for the individual or entity designated above. You are hereby notified that any dissemination, distribution, copying, or use of or reliance upon the information contained in and transmitted with this electronic transmission by or to anyone other than the recipient designated above by the sender is unauthorized and strictly prohibited. If you have received this electronic transmission in error, please notify the law office of Frank, Spicer & Cox P.C., by return e-mail or by telephone at (540) 552-0007 immediately. Any electronic transmission erroneously transmitted to you should be immediately returned to the sender or destroyed.

From: Carter, Kieran [<mailto:Kieran.Carter@fairfaxcounty.gov>]
Sent: Thursday, November 01, 2012 1:55 PM
To: Gould, Karen
Cc: Morrogh, Ray F.; Lingan, Casey
Subject: Virginia Supreme Court Rule 3A:11

Dear Ms. Gould,

I would like to express my concern with proposed Rule 3A:11(b)(3). This language (1) fails to extend necessary protections to prosecutors; and (2) is extremely open-ended and does not give prosecutors clear guidelines as to what information must be turned over. These faults are addressed below:

First, and most importantly, (b)(3) omits the language of 3A:11(b)(1) and (b)(2) that limits discovery to that which is "known by the Commonwealth's attorney to be within the possession, custody or control of the Commonwealth." This same language must be included within 3A:11(b)(3). An assistant Commonwealth's attorney cannot be expected to turn over information that the Commonwealth has no knowledge of. Without such limiting language, a Commonwealth's attorney could be liable for a bar violation for failing to turn over information that he or she knew nothing about. This just does not make sense and I would argue that it is unjust. Defense attorneys are not held to this standard; under appellate review and habeas case law, the failure by defense counsel to identify information that "negatively affects" the credibility of a Commonwealth's witness would only be a bar violation if it materially affected the outcome of the case.

Second, the language of (b)(3) is extremely vague and fails to put prosecutors on notice of what must be turned over. Specifically, the language requires the Commonwealth to turn over "relevant information favorable to the accused as to guilt, punishment, or a preliminary matter." But what information is "favorable to the accused"? Many times, I believe that specific information is extremely unfavorable to a defendant, but the defense attorney spins that same information to look favorable in the eyes of the fact finder. Other times, I may think a fact is absolutely irrelevant, but a defense attorney makes it into an important point. Very few facts are clearly favorable or clearly unfavorable. If everyone agreed about the facts of a criminal case, then there would be no need for jury trials! But more often at trial, defense attorneys are able to "surprise" a prosecutor with a defense or a twist that the Commonwealth was not expecting. It is exactly this unexpected, arguably "favorable" information that creates a question of fact for the judge or jury to determine. Ultimately, using the adjective "favorable" unreasonably asks prosecutors to anticipate every defense. The requirement to turn over "favorable" information would prove to be impossible to comply with.

Further, the second part of (b)(3) is also extremely vague. It states that the Commonwealth must turn over "any material facts that tend to impeach or negatively affect the credibility of the Commonwealth's witnesses." However, as described above, the Commonwealth does not always know whether a fact could be used to negatively affect the credibility of a Commonwealth's witness. Some facts may seem benign to a prosecutor but prove to be important to defense counsel. What happens if the Commonwealth does not consider a fact to "negatively affect" its witness's credibility? Would that prosecutor still be liable for a bar violation if he or she fails to turn over the information? As described above, such language

creates an unreasonable burden upon the prosecutor to anticipate all of defense counsel's defenses.

Ultimately, I believe that paragraph 3A:11(b)(3) is inarticulately crafted, unwise in proclamations, and should be omitted completely. The issues it attempts to solve have already been addressed under Brady v. Maryland. However, if the panel believes that such language is absolutely necessary, then two amendments should be included. First, include language that limits discovery to that which is "known by the Commonwealth's attorney to be within the possession, custody or control of the Commonwealth." Second, limit the "favorable" and "negatively impact" language to that which can be "reasonably anticipated by the Commonwealth". These amendments would create a fair playing field for both parties and eliminate the possibility of unwarranted bar complaints.

Please feel free to contact me if you have any questions about my position on 3A:11.

Regards,
Kieran Carter

Kieran Carter

Assistant Commonwealth's Attorney
Fairfax County Judicial Center
4110 Chain Bridge Road, Suite 114
Fairfax, Virginia 22030
(703) 246-2776 / direct line (703) 246-2245
Fax: (703) 691-4004

-----Original Message-----

From: paul roskin [proskin@vergaralaw.com]

Sent: Saturday, November 03, 2012 03:45 PM Eastern Standard Time

To: Gould, Karen

Subject: change in criminal discovery rules.

Dear Ms. Gould:

I have been a practicing criminal defense attorney for the past twelve years. I am writing in support of adoption of the proposed changes in the rules of criminal discovery.

I am most pleased with the change that will make police reports more available to defense attorneys at least at the Circuit court level. Under current practices, at least in the jurisdictions that I serve, most though not all Commonwealth attorney's offices will provide some information from the file, and in some cases read from the report. A written copy, that counsel can review however, is generally not available.

This change will be obviously a big help in understanding the case better, and the location of truly exculpatory evidence, such as inconsistencies among witness statements, or with other facts known by defense witnesses (such as the location of a particular building referenced in a report, or the time a particular fight supposedly occurred at a dance club, but the club was closed.) Under current practices, patently false statements regarding the details of alleged crimes, made to law enforcement, are sometimes not uncovered, if at all, until the trial is over. This is because no one, other than the giver of such statement, and the defendant or his witnesses, knows them to be false. The professionals: Police, Commonwealth and defense counsel simply don't know, and defense counsel may only learn this after sharing this information with his client. Thus having the full police report sometimes critical to uncovering all the misinformation that may be provided to police, (and thus potentially exculpate the defendant).>

Having said that, I think some of the other proposed changes could be improved upon. I believe the rules respecting a discovery request for the police report and other reports could be written to more resemble civil court practice. Thus a better rule would be defense counsel requests, and the Commonwealth provides, within 21 days. If the Commonwealth has a particular reason to redact names & addresses of a particular witness, they can do so by agreement with defense counsel, or file a motion with the court. Otherwise discovery of police and other reports referenced in the rule should be routine.

Regarding the time frame, 45 days advance notice to request a police report is simply too long. Cases are frequently set for trial within one month of term date. If certain commonwealth attorneys offices resist providing police report without a written order, cases may be needlessly delayed for months.

Finally, while I applaud the proposed action to be taken on the circuit court rule, I believe district court rules should be similarly modified to allow defense counsel copies of police and other reports sooner rather than later. Having such a report is very helpful at let us say, the preliminary hearing in a rape or murder case, or for that matter in resolving lesser situations at the district court level.

Again, overall, this rule change this is certainly an important step in the right direction. Insurance companies trying to minimize payments to accident victims will sometimes burden victims' counsel with of page after page of interrogatories, even for somewhat minor matters. Requiring the Commonwealth attorney to provide a copy of a police report to the lawyer of a man facing a lengthy prison sentence seems the least our rules can do ensure some basic semblance of due process.

Sincerely,

Paul S. Roskin, Esquire
VA Bar# 43156

THE MAGEE LAW FIRM, PLLC

6845 Elm Street

Suite 205

McLean, Virginia 22102-3822

JAMES E. MAGEE
CORINNE J. MAGEE
KATHRYN D. LECKEY
JOSEPH B. DAILEY

TELEPHONE: 703-356-7500
FACSIMILE: 703-356-6863

November 1, 2012

RECEIVED

Karen A. Gould, Executive Director
Virginia State Bar
707 E. Main Street, Suite 1500
Richmond, VA 23219

NOV 5 2012

VIRGINIA STATE BAR

Proposed amendments to Rule 3A:11

Dear Ms. Gould:

I am pleased to see VSB's attempt to expand the scope of 3A:11. I believe that the proposal is definitely a step in the right direction. I have two major concerns with the proposal as drafted:

1. Time requirements under (d) Expert witness designation and (e) time of filing motion. In Fairfax County, we have criminal term day on the Thursday after the 2nd Tuesday of the month. The court sets all felony trials within two (2) months. On October 18, 2012, the Chief Judge announced that all trials had to be set before December 6, 2012, which was less than two months...only 49 days, assuming I was able to be one of the 6 trials set for that LATEST TRIAL DATE. A motion for discovery is heard only on Fridays in Fairfax, and must be filed at least one week in advance. Under these rules, if I had the latest December 6, 2012 trial date, I would have to file my motion for discovery no later than October 22. If, as is more likely, I had an earlier trial date, I couldn't file it within 45 days. (The clerk will not accept motions in a case until the Grand Jury has found a true bill on an indictment.)

Assuming still that I had obtained the latest December 6, 2012 trial date and I received my discovery immediately, I would have to designate my expert no later than November 15, 2012. If the expert were for a court-appointed client, I would also have to find another date between the date of discovery and November 15 to file and argue a motion for expert witness fees once I reviewed the discovery and knew exactly what kind of expert I needed.

The time constraints just don't work in a jurisdiction like Fairfax, which, of course, is the busiest jurisdiction on the Commonwealth. Some jurisdictions automatically grant "standard discovery" orders on criminal term day, but if I need additional discovery or have any particular exculpatory information requests, I would still have to meet the 45-day requirement.

2. With respect to alibi, I would object to having to provide the Commonwealth with the names and addresses of any witness who will corroborate said alibi. Although the police reports may contain some names of witnesses, there is still no requirement that the

Commonwealth provide us with names and address of their witnesses. In my 25-years of defense work, I have seen numerous occasions where the defendant's witnesses are visited by the investigating officers and told that if they testify to particular information, that they will be charged with perjury, and the witnesses suddenly become unavailable, because even if they are telling the truth, they will be facing criminal prosecution. Furthermore, there have been numerous occasions where I am still trying to track down witnesses – whom my incarcerated client may only know as “Blackie,” or “Davie” -- days before trial, and I don't have access to DMV records or other official records that might give me an address.

Sincerely,

Corinne J. Magee

cc: David Lee, President, VACDL

.

-----Original Message-----

From: David Heilberg [DHeilberg@charlottesvillelegal.com]
Sent: Monday, November 05, 2012 11:56 AM Eastern Standard Time
To: Gould, Karen
Cc: David M Lee (david@davidmleelaw.com); bleighd@verizon.net
Subject: Virginia Supreme Court Rule 3A:11 reform

Ms. Gould:

The VACDL approved the attached reform of Rule 3A:11 in 2011 while I was President. I speak for myself when I comment that the current rule proposed by the Task Force doesn't go far enough. Nevertheless, many if not most of our members will want to see more disclosure consistent with our approved version of Rule 3A:11 and, if that can't be accomplished, whatever can be agreed to beyond the current Rule.

I copied this reply to our current President, David Lee, and President-elect (President in 2013), Leigh Drewry, to provide a more official response for our organization.

David L. Heilberg
Dygert, Wright, Hobbs & Heilberg, PLC
675 Peter Jefferson Parkway, Suite 190
Charlottesville, VA 22911
434-979-5515
434-295-7785 (fax)
dheilberg@charlottesvillelegal.com

Rule 3A:11. Discovery and Inspection in Criminal Cases.

A. In any criminal prosecution in a circuit court, general district court, or juvenile and domestic relations court, the attorney for the Commonwealth (hereinafter "the Commonwealth") shall have a duty to adequately and fully provide discovery as provided herein.

B. Unless there is written consent to follow an "open file" procedure, the Commonwealth shall respond to the defendant's written request for disclosure no later than thirty (30) days after the request is made in writing, or within such other time as may be ordered by the court.

C. The Commonwealth shall disclose to the defense, and permit the defense to discover, inspect, and copy, each of the following items and information in a timely fashion that permits counsel for the defendant to prepare for trial, provided such items and information are in the possession, custody or control of the Commonwealth, persons under the Commonwealth's direction and control, or persons who have participated in investigating or evaluating the case and either regularly report to the Commonwealth or have done so in the case:

1) All written or recorded statements and the substance of any oral statements made by the defendant, any co-defendants and all witnesses. The Commonwealth shall provide the names and addresses of witnesses and, when available, verbatim oral statements and, when not available, the substance of said oral statements.

2) Police reports and written reports of autopsies, ballistic tests, fingerprint analyses, handwriting analyses, blood, urine and breath tests, computer forensic analysis, except as limited by Va. Code § 19.2-270.1:1, other scientific reports, and written reports of a physical or mental examination of the defendant or the alleged victim made in connection with the particular case, or copies thereof, that are known by the Commonwealth to be within the possession, custody, or control of the Commonwealth.

3) Any facts of an exculpatory nature whatsoever including, but not limited to, favorable or exculpatory information disclosed in statements of persons the Commonwealth does not intend to call as witnesses, all promises, rewards, or inducements made to witnesses that the Commonwealth intends to present at trial, and original investigative notes written by law enforcement officers.

4) A summary of identification procedures, photographs of persons in lineups or photo arrays and all statements made in the presence of or by an identifying witness that relate to the issue of identity or to the identification procedures.

D. Subsections B and C shall have the force and effect of a court order, and failure to provide such discovery after a written request for production may result in application of any sanctions permitted for non-compliance with a court order; except that, if, in the judgment of the Commonwealth, good cause exists for declining to make any of the required disclosures (for example, safety of a witness or that of his or her family), it may move for a protective order and production of the item shall be stayed pending a ruling by the court. An order granting relief under this Rule shall specify the time, place, and manner of making the discovery and inspection permitted and may prescribe such terms and conditions as are just. Upon a sufficient showing, the court may, at any time, order that the discovery or inspection be denied,

restricted, or deferred, or make such other order as is appropriate. Upon motion by the Commonwealth, the court may permit the Commonwealth to make such showing, in whole or in part, in the form of a written statement to be inspected by the court in camera. If the court denies discovery or inspection following a showing in camera, the entire text of the Commonwealth's statement shall be sealed and preserved in the record of the court to be made available to the appellate courts in the event of an appeal by the defendant.

E. Upon written motion of the defendant, a court shall order the Commonwealth to permit the defendant to inspect and copy or photograph designated books, police reports, papers, documents, tangible objects, buildings or places, or copies or portions thereof, that are within the possession, custody, or control of the Commonwealth, upon a showing that the items sought may be material to the preparation of the defense and that the request is reasonable.

F. Disclosure shall be continuing and shall apply to any additional evidence or material discovered by the Commonwealth prior to or during trial which is subject to discovery or inspection and has been previously requested by the defendant.

G. This Rule does not authorize discovery of those portions of records, reports, correspondence, memoranda, or internal documents which are only the legal research, opinions, theories, or conclusions of the Commonwealth or of the defendant including, but not limited to, attorney work product and confidential communications with the defendant.

H. The defendant shall permit the Commonwealth within a reasonable time, but not less than 10 days before trial or sentencing, as the case may be, to inspect, copy or photograph any written reports of autopsy examinations, ballistic tests, fingerprint, blood, urine and breath analyses, computer forensic analysis and other scientific tests that may be within the defendant's possession, custody or control and which the defense intends to proffer or introduce into evidence at trial or sentencing.

1) Not later than 14 days before trial, the defendant shall disclose whether he or she intends to introduce evidence to establish an alibi and, if so, the defendant shall disclose the place at which he claims to have been at the time of the commission of the alleged offense.

2) If the defendant intends to rely upon the defense of insanity or feeble-mindedness, the defendant shall permit the Commonwealth to inspect, copy or photograph any written reports of physical or mental examination of the defendant made in connection with the particular case, provided, however, that no statement made by the defendant in the course of an examination provided for by this Rule shall be used by the Commonwealth in its case-in-chief, whether the examination shall be with or without the consent of the defendant.

3) The defendant shall disclose the names and addresses of eyewitnesses whom the defendant intends to call in its case-in-chief. If a witness or counsel for the defendant asserts that witness safety is a concern or that divulging the identity and address of a witness could create immigration consequences, the attorney for the defendant shall so state and provide a summary of that witness's expected testimony without divulging the identity or address of said witness.

I. Whenever the defendant or the Commonwealth intends to introduce expert opinion testimony at trial,

the opposing party shall be notified in writing of such intention to present such testimony at least 14 days before the trial. The defendant may supplement his or her designation and notice if the Commonwealth's notice requires additional expert witness assistance for the defense. Said supplemental designation and notice shall be filed within 7 days of the Commonwealth's expert witness notice. The written notice for each party shall include copies of any written reports of the witness, a summary of the proposed expert testimony that describes the witness's opinions and the basis and reasons for those opinions, and the witness's qualifications and contact information.

J. If, at any time during the course of the proceedings, it is brought to the attention of the court that the Commonwealth or the defendant has failed to comply with this Rule, or a party discovers additional material previously requested or falling within the scope of this Rule that was not disclosed, the court may order either party to permit the discovery or inspection, grant a continuance, or prohibit the Commonwealth or the defendant from introducing evidence not disclosed, or the court may grant such other relief as it deems appropriate and just under the circumstances.

-----Original Message-----

From: Phillip Menke [pmenke@manassaslawyers.com]

Sent: Monday, November 05, 2012 05:11 PM Eastern Standard Time

To: Gould, Karen

Subject: proposed amendment to Virginia Supreme Court Rule 3A:11

Dear Ms. Gould,

I have been practicing law in Prince William County, Virginia, since 2005 (VSB# 71265). I was on the county's court-appointed list for about three years, and I continue to practice traffic and criminal law. I have reviewed the proposed amendments to Virginia Supreme Court Rule 3A:11 that were published for public comment, and I am strongly support the amendments. I hope they will be adopted soon.

Thank you,

Phillip J. Menke

Attorney at Law

Coon & Purnell, PC

P.O. Box 530

Manassas, VA 20108

(703) 368-9196 tel.

(703) 361-0092 fax

www.manassaslawyers.com

-----Original Message-----

From: Les Adams [Les.Adams@aef-va.com]

Sent: Tuesday, November 06, 2012 07:00 PM Eastern Standard Time

To: Gould, Karen

Subject: Virginia Supreme Court Rule 3A:11

To Whom It May Concern:

With regard to the proposed amendments to Rule 3A:11, I wish to comment on the paragraph titled "Time of Motion."

Specifically, I object to restricting the time for filing a motion under the rule beyond 10 days and especially object to the 45 day restriction here proposed. In the jurisdictions in which I practice, it is not uncommon for the courts to schedule trials within 45 days of counsel having been appointed or having announced as counsel of record. Furthermore, I am not aware of any continuances of trial or pre-trial complications that have arisen due to the broad time currently allowed for filing under the current rule.

Sincerely,

Les R. Adams

ATTORNEY AND COUNSELOR AT LAW

TEL: 434-432-2531

FAX: 434-432-3510

LAW OFFICES

ADAMS, ELMORE AND FISK, PLC

2 NORTH MAIN STREET

P.O. BOX 459

CHATHAM, VIRGINIA 24531

-----Original Message-----

From: Julian Harman [mnknva@aol.com]

Sent: Wednesday, November 07, 2012 08:24 AM Eastern Standard Time

To: Gould, Karen

Subject: RULE 3A:11

Good morning, I have reviewed the proposed changes to Rule 3A:11 and find them to be acceptable with the exception of subsection "e" which calls for motions to be made at least 45 days prior to trial. I find this to be excessive even though the period may be shortened "for good cause shown". Criminal cases are such that many issues do not arise until the trial is much closer than 45 days away. Even 30 days would be better but 15 would be best,

Thanks for the opportunity to comment.

Julian Harman

VSB# 21753

mnknva@aol.com

Original Message-----

From: André Hakes [AHakes@tgblaw.com]

Sent: Wednesday, November 07, 2012 11:04 AM Eastern Standard Time

To: Gould, Karen

Subject: Virginia Supreme Court Rule 3A:11

I am writing in support of the Indigent Defense Task Force's proposed amendments to Virginia Supreme Court Rule 3A:11 for the following reasons:

1. More structure and consistency is needed in the criminal discovery process in Virginia. Some prosecutor's offices allow access, some copies, others nothing at all. The result is inconsistent treatment of criminal defendants across the different counties and cities.
2. Basic fairness demands it. As it stands now, defendants don't have a right to the most basic discovery, such as copies of the police reports in their own cases. It is fundamentally unfair for the accused not to have access to that basic information in advance of trial, in order to prepare a defense.
3. There is a chilling effect on the legitimate efforts of defense counsel under the current rule. Defense counsel often fear that if they take certain actions in defense of Client A, they and their other/ future clients may be penalized by a prosecutor's decision to cut off "open file" for that attorney. The result is that because the Commonwealth's Attorneys have unbridled discretion in deciding whether or not defense counsel receives the most basic information about their case, defense counsel are often placed in the ethically untenable position of deciding whether or not to take certain legal and legitimate actions in defense of one client, at the risk of harming another client in a completely unrelated matter.

I fully support the proposed amendments to Rule 3A:11.

-----Original Message-----

From: Shawn Stout [shawn.stout@blitzlegal.net]

Sent: Wednesday, November 07, 2012 02:57 PM Eastern Standard Time

To: Gould, Karen

Subject: Proposed Changes to Rule 3A:11

Dear Ms. Gould,

I am writing in support of the Indigent Defense Task Force's proposed amendments to Rule 3A:11. The following are some reasons why these amendments are desirable:

1. More structure and consistency is needed in the criminal discovery process in Virginia. Some prosecutor's offices allow access, some copies, others nothing at all. The result is inconsistent treatment of criminal defendants across the different counties and cities.
2. Basic fairness demands it. As it stands now, defendants don't have a right to the most basic discovery, such as copies of the police reports in their own cases. It is fundamentally unfair for the accused not to have access to that basic information in advance of trial, in order to prepare a defense.
3. There is a chilling effect on the legitimate efforts of defense counsel under the current rule. Defense counsel often fear that if they take certain actions in defense of Client A, they and their other/ future clients may be penalized by a prosecutor's decision to cut off "open file" for that attorney. The result is that because the Commonwealth's Attorneys have unbridled discretion in deciding whether or not defense counsel receives the most basic information about their case, defense counsel are often placed in the ethically untenable position of deciding whether or not to take certain legal and legitimate actions in defense of one client, at the risk of harming another client in a completely unrelated matter.

Thus, I fully support the proposed amendments.

Sincerely,

--

Shawn Stout

Attorney

Woolley Stout & Garin, PLLC

(703) 225-3330

shawn.stout@blitzlegal.net

-----Original Message-----

From: mcgheelaw@comcast.net [mcgheelaw@comcast.net]

Sent: Thursday, November 08, 2012 10:01 AM Eastern Standard Time

To: Gould, Karen

Subject: Virginia Supreme Court Rule 3A:11

Dear Ms. Gould:

I have been practicing law for a long time now. I first was a prosecutor here in Virginia for many years. During my time I always felt it was much easier for me to let the defense counsel see my entire file, and I mean everything. This way he or she knew what evidence I had and were closer to seeking an agreement to save time in court with a trial. Also, if they found weaknesses, and they told me it would make it easier for me to work things out too.

Here lately, I have found too many prosecuting attorneys withhold items that should have been given to defense attorneys. This bothers me, as we all, both sides, are officers of the court and we all have a duty to make sure that the truth comes forward at trial.

This is NOT a game of WIN, WIN, WIN. Should it become this way, we all lose!

I believe that there should be an open file policy as close as possible in discovery in criminal cases, which will speed up cases, and free courts to try cases that are really a questions of guilt or innocence, which a jury can decide. I prosecutor should always be honest and forth right to allow the defense see as much as possible.

Thank you for your time and attention to this.

Sincerely,

Seward M. McGhee, Esq.
28925

VIRGINIA INDIGENT DEFENSE COMMISSION

COMMISSION MEMBERS

Judge Alan E. Rosenblatt (ret.), Chair

Steven D. Benjamin

John G. Douglass

Karl R. Hade

Judge Edward W. Hanson, Jr.

Kristen Howard

Maria D. Jankowski

David R. Lett

Delegate J. Randall Minchew

Kent Smith

Senator Richard H. Stuart

David D. Walker

Carmen B. Williams

Kristi A. Wooten

1604 Santa Rosa Road, Suite 200
Richmond, Virginia 23229

Telephone(804) 662-7249 Facsimile(804) 662-7359
www.indigentdefense.virginia.gov

December 7, 2012

DAVID J. JOHNSON

Executive Director

DJ GEIGER

Deputy Director

EDWARD ERNOUF, III

Information Systems Director

AMY WILLIAMS

Human Resources Director

JEWELL HUDSON

Budget and Finance Director

Karen A. Gould, Executive Director
Virginia State Bar
707 E. Main St., Ste. 1500
Richmond, VA 23219

Re: Public Comment on Indigent Defense Task Force Amendments to Virginia
Supreme Court Rule 3A:11

Dear Ms. Gould,

On December 6, 2012, the Virginia Indigent Defense Commission met and voted to provide the following public comment on the proposed amendments to the Virginia Supreme Court Rule 3A:11.

The Virginia Indigent Defense Commission supports meaningful discovery reform in the Commonwealth and the efforts of the Virginia State Bar Indigent Defense Task Force to bring that about.

The Commission recognizes that full discovery in every criminal case throughout the Commonwealth is essential to the fair, accurate, and efficient administration of justice. The Commission will review and comment on any amendments that may be proposed by or to the Virginia Supreme Court or the Virginia General Assembly.

Thank you for the opportunity to provide comment on this proposal. Should you have any questions, please do not hesitate to contact me.

Sincerely,



David J. Johnson

RECEIVED

DEC 10 2012

VIRGINIA STATE BAR

Michael R. Doucette, President
City of Lynchburg

Raymond F. Morrogh, President Elect
Fairfax County

Nancy G. Parr, Vice-President
City of Chesapeake

LaBravia J. Jenkins, Secretary/Treasurer
City of Fredericksburg

David N. Grimes, Past President
Pittsylvania County

At Large Directors
Robert B. Beasley, Powhatan County
Paul B. Ebert, Prince William County
Joel R. Branscom, Botetourt County

NDAA Representative
Harvey L. Bryant, III, City of Virginia Beach

Board of Directors
Nathan R. Green
Williamsburg/James City County

Eric L. Olsen
Stafford County

Harvey L. Bryant, III,
City of Virginia Beach

Cassandra S. Conover
City of Petersburg

Gregory D. Underwood
City of Norfolk

William B. Bray
City of Colonial Heights

Patricia T. Watson
Greensville County / Emporia

Jeffrey W. Haislip
Fluvanna County

James R. Ennis
Prince Edward County

Stephanie Maddox
Amherst County

John C. Singleton
Bath County

William F. Neely
Spotsylvania County

Theo K. Stamos
Arlington County

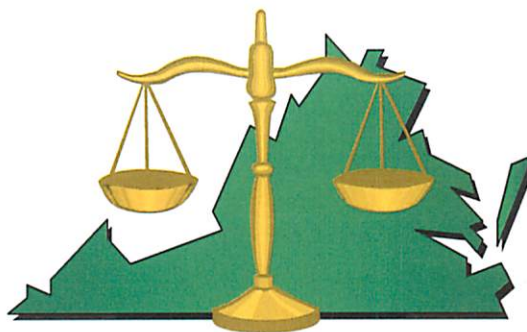
Nathan H. Lyons
Carroll County

Roy F. Evans
Smyth County

James E. Plowman
Loudoun County

James P. Fisher
Fauquier County

Raymond F. Morrogh
Fairfax County



Virginia Association of Commonwealth's Attorneys

December 12, 2012

RECEIVED

DEC 17 2012

VIRGINIA STATE BAR

Karen A. Gould, Executive Director
Virginia State Bar
707 E. Main Street, Suite 1500
Richmond, VA 23219

**Re: Public comment concerning proposed rule change to wit:
Virginia Rule of Court 3A:11 (Discovery and Inspection: Criminal)**

Dear Ms. Gould:

Please allow this letter to serve as the position of the Virginia Association of Commonwealth's Attorneys ("VACA") in the matter of the Indigent Defense Task Force's ("IDTF") draft of a proposed new rule concerning discovery in criminal cases. Inasmuch as the proposal amounts to a dramatic and drastic change to longstanding principles of Virginia practice, we greatly appreciate the opportunity to address the matters which arise from the IDTF re-draft of this rule.

In order to organize the numerous considerations in this matter, I have separated the primary points into the categories of (1) statement of general objection; (2) history, rationale and background of Rule 3A:11; and (3) major public policy flaws in the version set out by the IDTF. While there are certainly other considerations as to why this rule change should be rejected, these categories provide the basic framework for the compelling arguments against changing this established rule of practice.

Statement of General Objection

VACA believes, for the reasons set out below, that the draft of the IDTF's preferred version of a discovery rule for criminal cases is a radical and unnecessary departure from long standing criminal practice. Such a drastic new rule of practice involves public policy considerations which are more

Michael R. Doucette:
P.O. Box 1539
Lynchburg, Virginia 24505
(434) 455-3760 Fax (434) 846-5038

General correspondence:
P.O. Box 3549
Williamsburg, Virginia, 23187-3549

appropriately considered either by the General Assembly or the Virginia Supreme Court. Neither body has sought nor promoted the idea of such a comprehensive change to the current discovery rule.

History, Rationale and Background of Rule 3A:11

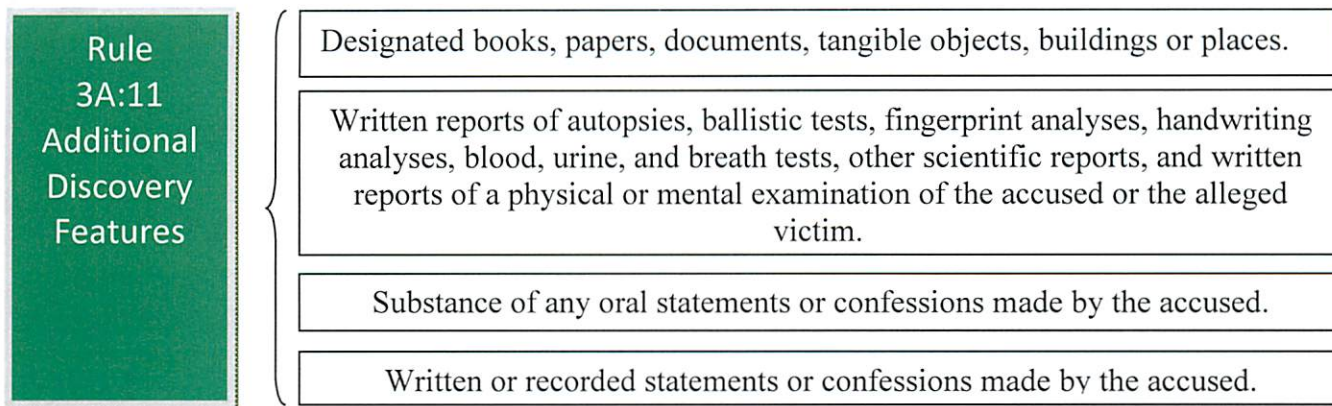
Challenges to the criminal discovery process are neither unique nor new to Virginia jurisprudence. The Virginia Supreme Court consistently has taken the position that pre-trial disclosure to criminal defendants generally proceeds via two distinct legal tracks.

Track one is *rule driven* (3A:11) and is based upon policy concerns that relate to the administration of justice in criminal cases. Those policy considerations take into account the very different goals of criminal prosecution versus civil litigation. Criminal prosecution is solely premised upon the pursuit of justice. Justice in criminal cases means that a criminal offender is apprehended and punished for his criminal act and often times, for the sake of public safety, separated from society.

In light of this, the public policy which undergirds rule 3A:11 is that Virginia's system of justice will provide fairness, but not favor, to a criminal defendant. The redraft of 3A:11 written by defense attorneys seeks a favorable rule of practice rather than a fair rule. When such a rule of practice becomes favorable to a criminal defendant, it becomes unfair to the society for whom the protective function of the criminal laws is designed.

Track two is based upon *constitutional due process requirements* arising out of Brady v. Maryland and related cases. This line of authority requires pretrial disclosure which also is premised upon fundamental fairness. But here, the requirement flows from the Constitution rather than a rule of practice. Both principles of law (rule based & constitutional) are geared toward fairness. The Constitution sets the floor of fairness whereas a policy based discovery rule may either be substantially level with such floor, or it may provide greater requirements of disclosure.

In Virginia, the rule already provides a higher level of disclosure which is not constitutionally required, but nonetheless, deemed to be a fair approach to pretrial disclosure by our courts. The defense bar, through the IDTF, now seeks to have Virginia's rule redesigned to be one of favor (to their practice and clients) rather than the rule that has deemed to be a fair one for at least half a century.



Brady v. Maryland – Constitutionally Required Disclosures – Existing Law

Major Public Policy Flaws of IDTF Proposed Version of 3A:11

(a) Failure to present a case for change:

The IDTF version of 3A:11 is based upon the assumption that conditions exist that require a sweeping liberalization of discovery in criminal cases. Other than anecdotal suggestions concerning fairness, there is no evidence to suggest a need to provide the defendant in a criminal case access to vital and confidential components of the prosecution's file. There have been contemporaneous public statements by members of the defense bar associated with this project that attempt to correlate a need for liberalized discovery to a claimed spike in "wrongful convictions" or "exonerations" of criminal defendants. This claim itself is the subject of dispute in terms of relative statistical compilations comparing conviction rates versus exoneration rates. These controversial and incendiary claims are far too often the product of special interest groups focused on an agenda other than the fair and impartial administration of criminal justice in this country or Commonwealth. This flaw itself should subject the claimed need for changing 3A:11 to a much greater debate than has been had to date. In fact, the claimed need to liberalize 3A:11 has been assumed without debate or reasonable inquiry. Thus, the IDTF has attempted to craft a rule which embraces aberrant exceptions to the overwhelmingly and generally reliable and fair prosecution of offenders in Virginia.

(b) Failure to appreciate the culture of criminal behavior that lends itself to abuse of all rules:

The IDTF version of 3A:11 fails to understand the reality of the criminal mindset from a "stake in the outcome" perspective. While we instruct jurors to assess credibility by, among other things, a consideration of a witnesses "stake in the outcome;" the IDTF version completely ignores the fact that criminal offenders are more willing than other litigants to prevaricate, obstruct justice and perjure themselves. The prospect of a perjury or obstruction of justice prosecution pales in comparison to the vast majority of the penalties associated with underlying crimes for which offenders are being prosecuted. A person willing to commit felonious acts is often very willing to engage in nefarious behavior associated with attempting to evade the consequences of the law. The IDTF version naively and completely ignores this reality. Rather it seeks to arm criminal defendants with, among other items, witness identities, statements and police reports. Such provisions would provide information from which a guilty defendant could manufacture or fabricate a defense. Facing the prospect of prison, the specter of an unlikely perjury prosecution would do little to enforce the mandate of the oath.

(c) Chilling effect on witnesses:

Witnesses are far less likely to participate willingly in a prosecution if their identities are known to a criminal offender. Witnesses already are often reluctant to "get involved" and when told their identities will be disclosed to the defendant, they will recoil from the prospect of testifying in court.

(d) IDTF's version of 3A:11 provides undue advantage:

The version set forth by the IDTF fails to appreciate the burden of proof undertaken by the prosecution which requires proof beyond a reasonable doubt. Additionally, in light of the presumption of innocence,

evidentiary rules and other robust constitutional guarantees; a new discovery rule which provides a large portion of the prosecutor's file is an advantage that is unnecessary and unfair.

(e) The mantle of "Minister of Justice" as recognized in Supreme Court jurisprudence:

The draft of 3A:11 proposed by the IDTF unnecessarily surrenders the ideal of the prosecutor's role as a "Minister of Justice" without any good cause. The IDTF draft is predicated on the assumption that basically all information should be turned over to the criminal defendant because the prosecuting attorney cannot be trusted to fulfill his role as one who is not engaged to convict, but rather to pursue justice. It also fails to reflect that the role of the defense attorney (and properly so) is a one-dimensional role which is to serve and protect the interest of his client; often to the exclusion of the finer notions of justice. Given this fact, the prosecutor is the best gatekeeper of investigative work product. The prosecutor may and often does root through the files of the government in order to assure the defendant has the information that he is entitled to have for his defense. The prosecutor does this as a matter of duty and obligation, and this duty should not be replaced by rule-based, open file discovery on the cynical assumption that the prosecutor cannot be trusted.

(f) Conflicting legal principles and unintended consequences:

Under Rule 1:16(e), recently construed in LEO 1864, the contents of the defense attorney's file – including "discovery responses"– must, if requested, be provided to the client upon termination of the representation. IDTF's version of 3A:11 would thus, at the conclusion of the case and perhaps even sooner, place in the hands of the defendant all police files, recordings and witness statements. The idea of police reports, recordings and witness statements being copied and circulated through the community and even uploaded to the Internet is repugnant to Virginia's prosecutors and anyone else with an interest in the safety and privacy of victims and witnesses. One Virginia prosecutor abandoned his practice of providing a copy of everything in his file to the defense when he learned that copies of the materials thus provided were being passed around at meetings of the Bloods street gang. The IDTF's version of 3A:11 would give the defendant in a child molestation case the ability to post on YouTube the victim's tearful description of the atrocities she suffered. A protective order is absolutely insufficient to guard against dissemination of these materials by a recalcitrant criminal offender who is facing far more consequences for their underlying criminal behavior than the punishment associated with a contempt charge which might flow from violating a protective order.

(g) Fiscal impact:

There are 120 elected Commonwealth's Attorneys serving 31 judicial districts and circuits in Virginia. A mandated procedure which produces a fiscal impact affecting one jurisdiction in a way which can be absorbed, although not without difficulty, may have a dire fiscal impact on another. The present form of the IDTF's desired rule revision would operate to create an unfunded mandate upon prosecution offices that would greatly strap the already under-funded resources of Commonwealth's Attorneys. The collection, processing and indexing of materials and other related workload increases, which would be required by this version of 3A:11; would significantly impair the productivity and reduce the services provided by many offices. Many offices currently have funding issues concerning staffing standards and employee compensation. The fiscal impact of this rule would be disparate throughout the

¹ Many jurisdictions have multiple appearances or court dates after indictment where the defendant does not yet have an attorney, and in fact his case will not even have a trial date.

Commonwealth with more affluent localities affected less while many other localities would be affected greatly.

(h) Timing of Discovery:

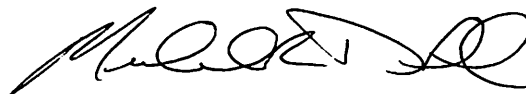
The IDTF's desired version of 3A:11 needlessly and with confusing language, infuses constitutional principles into the discovery rule by setting an arbitrary time (upon indictment) for production of what can be called *Brady* material.¹ Setting aside the imprecise language as to what may be a "material fact" that "tends" to impeach or "negatively affect" a witnesses credibility, the timing for disclosure is purely arbitrary and fails to appreciate that the time when the prosecutor discovers exculpatory evidence may be well before or well after the issuance of an indictment. *Brady* material is the subject of voluminous litigation and is incapable of being incorporated into a discovery rule with a one sentence provision which raises more questions than it answers. For rules to be effective, they must be meaningful, necessary and clear. This proposed subsection accomplishes none of these ideals. In short, constitutional principles regarding discovery are best governed by the caselaw rather than forcing them into a pre-trial practice rule of court.

(i) Unbalanced treatment of the parties:

The rule as drafted by the IDTF provides enhanced information flow to the criminal defendant, but not to the prosecution. There is no provision for the Commonwealth to discover investigative reports compiled by defense investigators, or recordings of witness interviews. There is no provision for the Commonwealth to discover tangible items of evidence, documents, records and photographs. There is no provision for the Commonwealth to receive inculpatory information known to the defense, or the identity of witnesses who may have been overlooked by the police. In short, the defense attorneys want more information, but chose to limit the information that they would provide in return. This unbalanced treatment is another indicator that what is actually sought is a favorable environment for the criminal defendant rather than basic fairness.

In conclusion, I thank you for the opportunity to address some of the issues associated with the IDTF's proposed 3A:11 draft. I am available and happy to entertain questions regarding this matter should that be desired. VACA strongly opposes this rule change and will continue to articulate this opposition. This does not mean that individual prosecutors may not craft local discovery solutions which are sensible in their own jurisdictions, but rather a reflection that Virginia prosecutors embrace the solid foundation of the current rule.

Sincerely,



Michael R. Doucette, President
Virginia Association of Commonwealth's Attorneys

¹ Many jurisdictions have multiple appearances or court dates after indictment where the defendant does not yet have an attorney, and in fact his case will not even have a trial date.



OFFICE OF THE COMMONWEALTH'S ATTORNEY

City of Suffolk
Godwin Courts Building
150 North Main Street
Suffolk, Virginia 23434-4552



MAIN NUMBER (757) 514-4365
VICTIM-WITNESS (757) 514-4366
FAX (757) 514-4400

COMMONWEALTH'S ATTORNEY
HILLIPS FERGUSON

DEPUTY COMMONWEALTH'S ATTORNEYS
MATTHEW A. GLASSMAN
WILL H. JAMERSON
JAMES E. WISER

ASSISTANT COMMONWEALTH'S ATTORNEYS
SHAVAUGHN N. BANKS
NICOLE A. BELOTE
VAUGHN T. BREEDLOVE
GEORGE W. BRUCH
F. JEFFERSON JAMES
MARILYN A. SALLEE
ROBERT H. SANDWICH, JR.
HEATHER E. SHELTON
T. MARIE WALLS
SUSAN H. WALTON

Please visit our website:
www.suffolk.va.us/cwattv/

CHIEF ADMINISTRATIVE MANAGER
KAREN H. WILLIAMS

CHIEF INVESTIGATOR
NEIL M. BOONE

COMMUNITY OUTREACH COORDINATOR
JOAN R. TURNER

VICTIM-WITNESS DIRECTOR
DIANE BRYANT

ASSISTANT VICTIM-WITNESS DIRECTORS
SONYA L. ABBOTT
ALLISON M. VANPEEREN

December 17, 2012

Karen A. Gould, Executive Director
Virginia State Bar
707 E. Main Street, Suite 1500
Richmond, VA 23219

RECEIVED

DEC 20 2012

Re: Public comment concerning proposed change to Virginia Rule 3A:11

VIRGINIA STATE BAR

Dear Ms. Gould,

Please let this letter serve as the position of the fourteen (14) individual lawyers that encompass the Suffolk Commonwealth's Attorney's Office ("SCA") concerning the Indigent Defense Task Force's ("IDTF") unsolicited proposal to amend Virginia Rule 3A:11. The SCA fully supports and adopts the position that has been very well stated by the Virginia Association of Commonwealth's Attorneys ("VACA"). For your convenience, please find VACA's letter enclosed. In addition, we would like to state the following:

The SCA believes that the IDTF's proposal fails to accurately articulate a need for such a sweeping change to Rule 3A:11 and the IDTF drafted the amendment in such a fashion as to tip the balance of the fair and just rule into the complete favor of the criminal defendant. The amendment burdens the Commonwealth with timely and costly requirements concerning the production of information without the defendant being required to reciprocate in the same manner.

Further, the SCA believes that the Virginia State Bar has acted outside its regulatory mandate in promoting an unsolicited rule proposal from a unilaterally self-appointed "Task Force" with a self-serving bias and agenda. This was not a rule that was promulgated or requested by the General Assembly or the Virginia Supreme Court. All of the attorneys in this office are required to pay mandatory dues to the Virginia State Bar, and we do not feel it is appropriate for our funds to be used to support such a biased and non-truth seeking agenda.

The ethical rules clearly note that prosecutors are "ministers of truth and justice" i.e. we have a responsibility beyond other attorneys to seek the truth. The duty for defense attorneys is to zealously represent

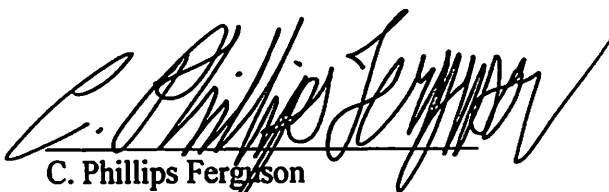
their clients (they are not seekers of the truth). This is a critical distinction given that the information relayed will not serve any interests in "truth" seeking but rather to give opposing counsel greater opportunity to cloud the issues and allow witness and victim statements to become a penetrating weapon to be used against them—not in the search for truth, but to muddy up the waters with non-issues and to jeopardize the safety and lives of crime victims and witnesses.

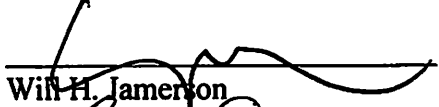
In conclusion, we believe the current rule is fair to all parties and provides more than is constitutionally required. Therefore, we strongly object to the IDTF's proposed amendment to Rule 3A:11.

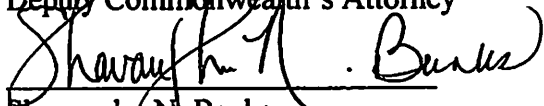
We appreciate your attention to this matter.

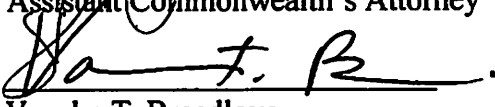
Thanking you, we are

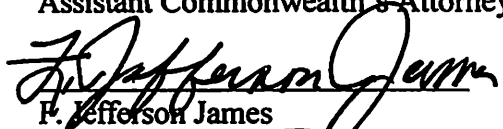
Sincerely yours,


C. Phillips Ferguson
Suffolk Commonwealth's Attorney

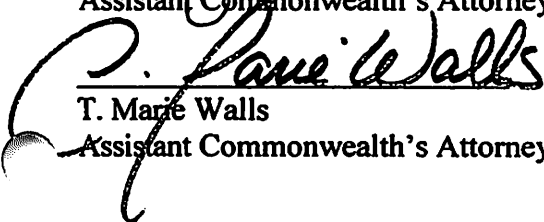

Will H. Jamerson
Deputy Commonwealth's Attorney

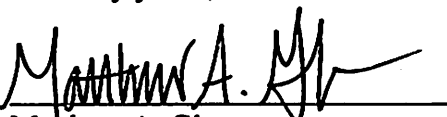

Shavaughn N. Banks
Assistant Commonwealth's Attorney

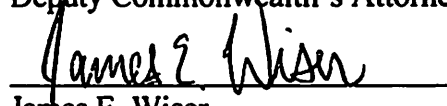

Vaughn T. Breedlove
Assistant Commonwealth's Attorney


F. Jefferson James
Assistant Commonwealth's Attorney

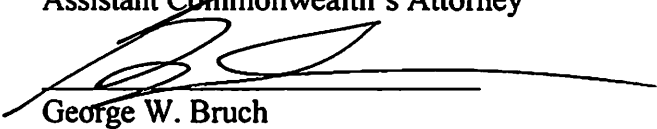

Robert H. Sandwich, Jr.
Assistant Commonwealth's Attorney

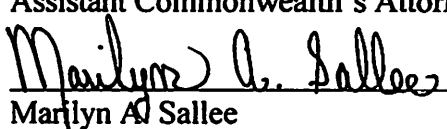

T. Marie Walls
Assistant Commonwealth's Attorney

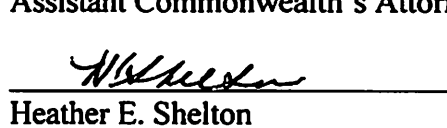

Matthew A. Glassman
Deputy Commonwealth's Attorney

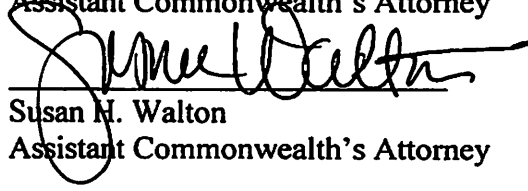

James E. Wiser
Deputy Commonwealth's Attorney


Nicole A. Belote
Assistant Commonwealth's Attorney


George W. Bruch
Assistant Commonwealth's Attorney


Marilyn A. Sallee
Assistant Commonwealth's Attorney


Heather E. Shelton
Assistant Commonwealth's Attorney


Susan M. Walton
Assistant Commonwealth's Attorney

**Cc: Virginia State Bar Council Members
Supreme Court of Virginia**



From: Lawrence Brooke [<mailto:brookelaw1@verizon.net>]

Sent: Friday, January 04, 2013 12:50 PM

To: Gould, Karen

Subject: *

Importance: Low

One cannot address the proposed changes to Rule 3A:11 on discovery without considering the recent intentional failures to provide exculpatory evidence by so many Virginia prosecutors. These failures have been judicially determined to exist by federal and state judges. In each case the exculpatory evidence was discovered by luck or accident, not surrendered by a suddenly remorseful prosecutor.

In Hash v. Johnson, 845 F. Supp 2nd 711, Judge James C. Turk, Senior District Judge for the Western District of Virginia, found outrageous failure to provide plea negotiations and polygraph results that would have shown their witnesses were lying, as well as other intentional misconduct. The Judge found a disturbing miscarriage of justice and an "extreme malfunction" of the state criminal justice system. Although the prosecutor resigned he maintained that he had done nothing wrong. The proposed rule changes would have required the disclosure of the evidence. The case was decided February 28th, 2012. I believe the bar has taken no action against the prosecutor. An ethics complaint was filed against the prosecutor in June of 2012.



In Wolfe v. Clarke, 691 F3d 410, The Fourth Circuit found intentional suppression of exculpatory evidence. The prosecutor explained that his office did not have an open file policy because in the past he had found that when information is given to defendants and their counsel they are able to fabricate a defense. The Federal Judge found this assertion "flabbergasting" and so do I. The proposed rule changes would have disclosed the exculpatory evidence. The opinion was written. The case was decided August 16th, 2012. The bar has taken no action against the prosecutor.

In Commonwealth v. Manigo, 2010 Va. Cir Lexis 6, Fairfax Circuit Court Judge David S. Schell found a prosecutor had failed to provide exculpatory evidence and correct false testimony of a witness. The Judge found that failure to disclose a deal with prosecution witnesses and allowing them to lie about it on the witness stand violated due process. The proposed rule changes would have disclosed the deal that effected their credibility. The case was decided January 6th, 2010 and on June 4th, 2012 the bar gave the prosecutor a public reprimand.

These cases are examples of the reluctance of prosecutors to share facts. A further example was their withdrawal, last August, from the task force discussing discovery when they realized the discussions might actually result in discovery. Discovery and the disclosure of exculpatory evidence are two aspects of the same issue.



In the cases I mentioned; A sentence of decades in the penitentiary, a sentence of life in prison, and a death sentence were overturned when luck or accident allowed desperate defense attorneys to discover the evidence that was withheld. One must assume that hundreds of other cases like these go undiscovered (literally). If you consider misdemeanors, the cases number in the thousands. The proposed Rule would not apply to most misdemeanors prosecuted in Virginia. If



the rule is designed to be fair, one must assume they are omitted because, for misdemeanors, it would be too much trouble to be fair.

Unlike many other prosecutor's offices, the City of Alexandria has an open file policy and gives access to all the materials in their files in prosecutions for felonies and misdemeanors. It seems to be no trouble at all. Not coincidentally, no one in their office has ever been accused of failing to disclose exculpatory evidence. Their prosecutions are vigorous and successful and the trials are fair.

They feel it is fundamentally important to make criminal prosecutions fair. My question is; Do the Virginia State Bar and the Supreme Court of Virginia feel the same?

—Original Message—

From: TullerB2@aol.com [TullerB2@aol.com]

Sent: Friday, January 04, 2013 12:55 PM Eastern Standard Time

To: Gould, Karen

Subject: Virginia Supreme Court Rule 3A:11

One cannot address the proposed changes to Rule 3A:11 on discovery without considering the recent intentional failures to provide exculpatory evidence by so many Virginia prosecutors. These failures have been judicially determined to exist by federal and state judges. In each case the exculpatory evidence was discovered by luck or accident, not surrendered by a suddenly remorseful prosecutor.

In *Hash v. Johnson*, 845 F. Supp 2nd 711, Judge James C. Turk, Senior District Judge for the Western District of Virginia, found outrageous failure to provide plea negotiations and polygraph results that would have shown their witnesses were lying, as well as other intentional misconduct. The Judge found a disturbing miscarriage of justice and an "extreme malfunction" of the state criminal justice system. Although the prosecutor resigned he maintained that he had done nothing wrong. The proposed rule changes would have required the disclosure of the evidence. The case was decided February 28th, 2012. I believe the bar has taken no action against the prosecutor. An ethics complaint was filed against the prosecutor in June of 2012.

In *Wolfe v. Clarke*, 691 F3d 410, The Fourth Circuit found intentional suppression of exculpatory evidence. The prosecutor explained that his office did not have an open file policy because in the past he had found that when information is given to defendants and their counsel they are able to fabricate a defense. The Federal Judge found this assertion "flabbergasting" and so do I. The proposed rule changes would have disclosed the exculpatory evidence. The opinion was written. The case was decided August 16th, 2012. The bar has taken no action against the prosecutor.

In *Commonwealth v. Manigo*, 2010 Va. Cir Lexis 6, Fairfax Circuit Court Judge David S. Schell found a prosecutor had failed to provide exculpatory evidence and correct false testimony of a witness. The Judge found that failure to disclose a deal with prosecution witnesses and allowing them to lie about it on the witness stand violated due process. The proposed rule changes would have disclosed the deal that effected their credibility. The case was decided January 6th, 2010 and on June 4th, 2012 the bar gave the prosecutor a public reprimand.

These cases are examples of the reluctance of prosecutors to share facts. A further example was their withdrawal, last August, from the task force discussing discovery when they realized the discussions might actually result in discovery. Discovery and the disclosure of exculpatory evidence are two aspects of the same issue.

In the cases I mentioned; A sentence of decades in the penitentiary, a sentence of life in prison, and a death sentence were overturned when luck or accident allowed desperate defense attorneys to discover the evidence that was withheld. One must assume that hundreds of other cases like these go undiscovered (literally). If you consider misdemeanors, the cases number in the thousands. The proposed Rule would not apply to most misdemeanors prosecuted in Virginia. If the rule is designed to be fair, one must assume they are omitted because, for misdemeanors, it would be too much trouble to be fair.

Unlike many other prosecutor's offices, the City of Alexandria has an open file policy and gives access to all the materials in their files in prosecutions for felonies and misdemeanors. It seems to be no trouble at all. Not coincidentally, no one in their office has ever been accused of failing to disclose exculpatory evidence. Their prosecutions are vigorous and successful and the trials are fair.

They feel it is fundamentally important to make criminal prosecutions fair. My question is; Do the Virginia State Bar and the Supreme Court of Virginia feel the same?



Virginia State Bar

Eighth and Main Building
707 East Main Street, Suite 1500
Richmond, Virginia 23219-2800
Telephone: (804) 775-0500

Facsimile: (804) 775-0597 TDD (804) 775-0502

January 7, 2013

Via USPS and E-Mail to gould@vsb.org

Karen A. Gould, Executive Director
Virginia State Bar
707 E. Main Street, Suite 1500
Richmond, Virginia 23210

RE: VSB Indigent Defense Task Force Proposed Amendment to Rule 3A:11 of the Supreme Court of Virginia

Dear Ms. Gould:

We are writing on behalf of the Standing Committee on Legal Ethics to express some concerns about the proposed amendments to Rule 3A:11; specifically, whether the proposed discovery rules are consistent with prosecutors' ethical duties as established by Rule 3.8 and related ethics opinions, including LEO 1862.

We have three concerns about the proposed amendments. First, section (b)(3) provides that the prosecutor only has to provide relevant exculpatory evidence, including evidence that impeaches the Commonwealth's witnesses, "upon indictment" of the accused. Paragraph (b)(3) should say: "Upon indictment, or as soon as practicable thereafter. . . ." The Commonwealth's attorney may not know of any exculpatory evidence at the time an indictment is issued, but the rule should make clear that the prosecutor has a continuing duty to disclose exculpatory evidence when she learns of it. LEO 1862 does not specify an exact time frame for disclosure of exculpatory evidence, but it does require that exculpatory evidence be provided to the defense as soon as practicable once the prosecutor is aware of its existence, and that a prosecutor may be ethically obligated to provide this evidence even though the trial-focused legal duties established by *Brady v. Maryland* and subsequent case law are not yet applicable.

A second, and related, issue is that section (b)(4) presumptively allows the Commonwealth to redact identifying witness information when necessary to protect the witness's safety, thereby putting the burden on the defendant/his lawyer to seek a court order releasing the information. Under Rule 3.8(d), the prosecutor has an obligation to produce all evidence that "tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment, *except when disclosure is precluded or*

Letter to Karen A. Gould
January 7, 2013
Page Two

modified by order of a court.” Thus, Rule 3.8’s obligation is the reverse of that created by proposed section (b)(4); ethically, the prosecutor is required to disclose information or seek a court order modifying that disclosure, while the proposed discovery rule would permit the prosecutor to withhold certain information and place a burden on the defendant to seek a court order compelling the production of that information. This problem could be rectified by amending section (b)(4) to state:

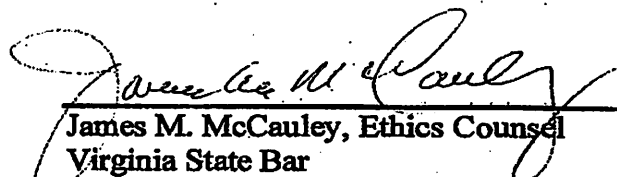
For good cause shown and pursuant to a protective order entered by a court, the Commonwealth may redact the identity and address or other similar identifying information of a witness when necessary to protect the safety of that witness or his or her family.

Finally, the proposed rule, in section (a), generally permits open file discovery, without specifically defining any obligations that the prosecutor has to provide exculpatory evidence under such a system. The Committee believes that a prosecutor must specifically make the defendant/lawyer aware of exculpatory evidence, even though the evidence is available as part of the entire open file. A prosecutor does not fulfill her ethical obligation to “make timely disclosure” of exculpatory evidence if she intermingles known exculpatory evidence with hundreds or thousands of pages of documents without taking any steps to draw the defendant/lawyer’s attention to a particular piece of evidence.

Respectfully,



Marni E. Byrum, Chair
VSB Standing Committee on Legal Ethics



James M. McCauley, Ethics Counsel
Virginia State Bar



From: Brian Miller [<mailto:brian@basnightkinser.com>]
Sent: Wednesday, January 09, 2013 2:48 PM
To: Gould, Karen
Subject: Virginia Supreme Court Rule 3A:11

Karen,

Why not amend the rule to permit this discovery in General District Court prior to Preliminary Hearing?

It would help encourage early plea negotiations and probably increase the number of waivers thus lightening the very crowded General District Court dockets.

Thanks,

Brian



Brian K. Miller, Esquire
BASNIGHT, KINSER, TELFEYAN,
LEFTWICH & NUCKOLLS, P.C.
308 Cedar Lakes Drive, 2nd Floor
Chesapeake, VA 23322-0017
(757) 547-9191 (Main)
(757) 382-4157 (Kimberly Legal Asst.)
(757) 382-5633 (Facsimile)



COMMONWEALTH of VIRGINIA

DEPARTMENT OF FORENSIC SCIENCE

OFFICE OF THE DIRECTOR
A Nationally Accredited Laboratory

January 11, 2013

700 NORTH 5TH STREET
RICHMOND, VIRGINIA 23219
(804) 786-2281 FAX (804) 786-6857

Karen A. Gould
Executive Director
Virginia State Bar
707 E. Main Street, Suite 1500
Richmond, Virginia 23219

RE: Comment on Proposed Amendments to Virginia Supreme Court Rule 3A:11

Dear Ms. Gould:

In October, the Virginia State Bar published proposed amendments to Virginia Supreme Court Rule 3A:11, which governs discovery in felony and certain misdemeanor cases in Virginia's Circuit Courts, and invited public comment. I have carefully reviewed these proposed changes and write to express my concerns regarding Proposed Rule 3A:11(d), which creates discovery obligations for a party to criminal litigation intending to introduce expert testimony. While a variety of expert witnesses may testify in criminal trials, the most common forensic expert in a Virginia criminal case is likely to be an employee of the Virginia Department of Forensic Science (DFS or the Department). As written, Proposed Rule 3A:11(d) will have a significant, negative impact on the Department. The drain on personnel and fiscal resources, as well as a number of global issues relevant to forensic science, are the substance of my comments below.

The Virginia Department of Forensic Science, A Neutral and Independent Laboratory

The Department is an internationally accredited forensic science laboratory system operating as an Executive Branch agency under the Public Safety Secretariat. The Department is independent of law enforcement in that its budget and supervision are separate from any direct connection with a law enforcement agency. The Department's powers and duties, as set out in Virginia Code §9.1-1101, establish its mission to protect the public's safety, support the needs of the criminal justice system and advance the growth and understanding of forensic science. This structure allows the Department, with the assistance of its affiliated Forensic Science Board and Scientific Advisory Committee, to set its own priorities with respect to casework and finances.

DFS experts consult with and testify for both the defense and the prosecution in Virginia criminal cases. The Department also performs analysis for the defense, both prior to trial and post-conviction, pursuant to court order. Our experts also regularly speak with outside experts, who are privately retained by a party to criminal litigation, to discuss the results of analysis.

The Department is accredited through the American Society of Crime Laboratories Directors Laboratory Accreditation Board (ASCLD/LAB). This accreditation utilizes and is compliant with the international standards established by ISO/IEC 17025, which sets requirements for, among other things, the content of laboratory reports, case documentation including notes, the reporting of the uncertainty of measurements and the use of standardized reporting language. The results of the Department's analysis, consistent with these standards, is reported in a Certificate of Analysis. To facilitate your understanding of the contents of such a Certificate, I have enclosed a Certificate of Analysis for your review. The identifying case information has been redacted in this example.

In the interest of understanding and transparency, DFS publishes its current procedures on the Department's website at <http://www.dfs.virginia.gov>. DFS examiners are available to consult pre-trial with both parties to a criminal case. During pre-trial consultations, any party to a Virginia criminal case may ask questions about the examinations performed as well as review the case file, quality assurance or validation documentation with the examiner and obtain an examiner's statement of qualifications. Because DFS is a public laboratory, these services are provided at no cost to either party.¹ The only actions a party to a Virginia criminal case must take to discuss a DFS forensic examination relating to the litigation is to *call the relevant examiner(s) and ask*.

The Department's neutrality extends to document production. As I mentioned earlier, the results of any analysis performed by the Department are reported in a Certificate of Analysis. DFS provides the original certificates to the submitting agency in most cases, but is required by law to provide the original Certificate to the relevant Commonwealth's Attorney in controlled substance examinations and to the relevant court in certain cases relating to Virginia's implied consent laws. Pursuant to Virginia Code §9.1-1104, DFS provides copies of Certificates of Analysis to accused persons or their attorneys upon written request. DFS also provides copies of case file documentation, including, among other requested documents, bench notes, photographs, communications, chain of custody, quality control records and electronic data, to either the prosecution or the defense pursuant to a lawfully served subpoena *duces tecum* for non-party records.²

¹ DFS also regularly receives document and witness subpoenas in civil cases relating to analyses DFS performed in a criminal investigation. Because the agency's mission is to support the criminal justice system, DFS charges a fee for any expert consultation or testimony in a civil matter.

² See Va. Code Ann. §19.2-187.2 (addressing subpoenas *duces tecum* issued to the Department in criminal cases).

DFS is both proud and protective of its status as a neutral public laboratory. The National Academy of Sciences Committee on Identifying the Needs of the Forensic Science Community in its report *Strengthening Forensic Science in the United States: A Path Forward* (NAS Report), recommended separating “public forensic laboratories and facilities from the administrative control of law enforcement agencies or prosecutors’ offices.”³ Organizations such as the American Bar Association and the National Association of Criminal Defense Attorneys also have promoted neutral forensic laboratories. Unlike most states and the federal government, Virginia actually implements this model.

Proposed Rule 3A:11(d) Negatively Impacts the Department’s Neutrality

Proposed Rule 3A:11(d) incorrectly assumes that, in every criminal prosecution, the testifying DFS expert is an agent of the party offering their testimony. This is not the case. Indeed, the Department’s efforts to provide equal access to its experts and records to both parties to criminal litigation, as well as Virginia law, support the view that DFS is not an agent of either party.⁴ Laboratories, which are otherwise neutral, should not be required to act as an agent of the prosecution or the defense in the criminal discovery process. To do otherwise would be contrary to the very principles of forensic science.

Proposed Rule 3A:11(d) also incorrectly assumes a discovery rule is needed to afford the parties to a Virginia criminal case access to the results of a forensic examination performed by DFS, the opinion of DFS experts, the basis and reasons for those opinions and the qualifications and contact information for the Department’s experts. As described above, both parties already have such access to information regarding case-specific forensic examinations.

The Department’s existing cooperation with criminal litigants, along with as the existing procedures allowing for the issuance of a non-party subpoena for document production, are well-suited to support and preserve the autonomous neutral laboratory while also affording an appropriate level of access. Moreover, judicial oversight of the production of non-party records is a well-developed and controlled process that ensures against the misuse of extremely sensitive data possessed by forensic laboratories.

The Cost of Proposed Rule 3A:11(d)

Proposed Rule 3A:11(d) requires the party introducing expert testimony at trial to produce “copies of any written reports of the witness, a summary of the proposed expert testimony that describes the witness’s opinions and the basis and reasons for those opinions as well as the witness’s qualifications and contact information.” Given the unqualified breadth of this language, it appears possible this information will be produced in most felony cases, as discovery often precedes even plea agreements. Also, it appears possible the “summary” of the expert’s testimony will require every DFS expert involved in a specific case (therefore, a potential trial witness) to spend *at least* one hour per case

³ See NAS Report, p. 190-91.

⁴ See Virginia Code §19.2-187.2; *Ramirez v. Commonwealth*, 20 Va. App. 292, 456 S.E. 2nd 531 (1995).

with one or both parties to the litigation to assist the parties' efforts to produce this written summary. Also, the term "basis and reasons for those opinions" could be interpreted to require DFS to produce in every case its entire case file, meaning the case-specific records documenting the basis for the opinion reported in the Certificate of Analysis. Finally, it is likely DFS will be required to produce a Statement of Qualifications, an example of which is also enclosed, for each examiner involved in a case subject to the Proposed Rule.

To fully understand the serious fiscal impact of the Proposed Rule, it is illustrative to consider the application of the Proposed Rule in one of the most common and, from a DFS documentation standpoint, simplest felony charges -- the possession of a controlled substance.

First, let us consider the following hypothetical case under the existing discovery obligations. The police seized a pipe, which DFS analyzed and determined to contain cocaine residue, from the coat pocket of the accused person, during a search incident to arrest on an outstanding warrant. The police charged the accused person with felony possession of a controlled substance. After a preliminary hearing, in which the Department's Certificate of Analysis was introduced as well as the arresting officer's testimony that the pipe was recovered from the accused persons' coat pocket and that the accused stated, after *Miranda* warnings, that he is addicted to crack cocaine, the General District Court certified the felony charge to the grand jury and a true bill was returned, resulting in a single felony indictment. The case was scheduled for trial. As is his practice, the defense attorney automatically filed a motion for discovery under Rule 3A:11 of the Supreme Court of Virginia. A discovery order was entered and discovery was exchanged. In addition to the information provided in discovery, the defense attorney obtained a copy of the Certificate of Analysis from DFS pursuant to Virginia Code §9.1-1104. The attorney had a question about the analysis, so he called the DFS examiner, discussed the analysis process and is satisfied with the answers he received. The defense attorney decided he does not need to request a subpoena *duces tecum* for the Department's case file documentation because he has concluded there is no issue with the analysis in the case. Rather, the issue is that the accused claims the coat belonged to a friend and that he had no knowledge of the pipe in the coat pocket. Within a week of the scheduled trial, the prosecutor offered a plea agreement for suspended jail time. The accused person accepted the offer and entered a plea of guilty on the original trial date. In this common scenario, DFS produced one piece of paper by U.S. mail to the defense attorney. This administrative process took 15 minutes. The DFS expert spent 10 minutes on the telephone with the defense attorney answering his questions. The cost to DFS in personnel and physical resources is approximately \$14.14.

In stark contrast, let us now view this same simple case with the same issues and the same outcome in light of Proposed Rule 3A:11(d). In the discovery process, the prosecutor called the DFS expert to discuss the summary of the experts proposed testimony and requested all case file documentation and the expert's Statement of Qualifications. This telephone call took one hour. DFS administrative personnel copied the entire case file, which, as is typical for a single item controlled substance

examination, totals 11 pages, included the expert's two page Statement of Qualifications and mailed this 13-page packet of documents to the prosecutor. This administrative process took 30 minutes. The cost to DFS in personnel and physical resources is approximately \$60.26.⁵

During a single month in 2012, the Department's four Controlled Substances Sections completed 1543 cases involving drugs other than marijuana, *i.e.*, drugs in cases that are likely to be subject to the Proposed Rule. Assume for a moment one-half of those cases result in Circuit Court charges. Under the Proposed Rule, DFS would be required to produce approximately 10,000 pages of documents and expend over 1000 man hours to satisfy the Proposed Rule for one month of its Controlled Substance Section cases. This example is astounding in that this is the *minimum* projected per case impact. Other case file documentation in a complicated DNA analysis, for example, could number hundreds of pages.

DFS completed 58,017 forensic examinations in 2012, 53,549 examinations in 2011, 54,214 examinations in 2010 and 56,225 examinations in 2009. Considering the reality of automatically producing documents and extensive discussions regarding expert testimony summaries for each of these cases and you begin to see the cumulative financial and environmental effects of automatic discovery. If criminal charges result from even one-third of these completed examinations, millions of pages of documents would be automatically produced in the criminal discovery process. DFS would require significant, additional resources to satisfy this burden. Given the fact that a vast majority of criminal cases are resolved by plea agreement,⁶ this level of document production and examiner time for every case is not a responsible use of taxpayer funds.

Moreover, the dollar figure quoted above does not account for the impact diverting resources in this manner will certainly have on the Department's ability to perform forensic examinations within a reasonable time. Every hour spent on written summaries or other discovery obligations is an hour the Department's experts will spend out of the laboratory and away from casework. Given this, the decision to allocate the Department's resources to automatic discovery in every criminal case as contemplated in Proposed Rule 3A:11(d), will have a devastating impact on the Department's analysis turn around times and, in turn, will impact criminal investigations and the prosecution's ability to satisfy Virginia's speedy trial deadlines. This will be a public safety issue in Virginia.

The existing subpoena process requires litigants to consider the facts of their case, the issues and strategy specific to their trial and to then determine whether the forensic

⁵ These estimates assume a standard copy rate of \$.10 per page, first class U.S. Mail postage as of today's date, DFS Controlled Substance Examiners' average hourly rate including benefits of \$46.39 and an administrative staff average hourly rate including benefits of \$23.45 per hour. It is also important to note these estimates assume the applicable attorney will draft the testimony summary. Should it be determined that the expert must write this summary, the time required to produce this writing would be far greater than one hour.

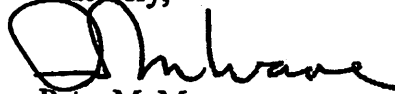
⁶ See *Melendez-Diaz v. Massachusetts*, 557 U.S. ____ 07591, slip op. p. 19-20 (citing Brief of Law Professors as *Amicus Curiae*).

science case file documentation is relevant to their trial preparation. Additionally, should a litigant determine that a pre-trial consultation with an involved DFS expert is necessary, this level of access and accommodation requires a simple phone call. This system minimizes waste while simultaneously providing the appropriate access and transparency for adequate trial preparation. I urge you to consider maintaining the existing process rather than the automatic provisions of Proposed Rule 3A:11(d).

Conclusion

I fully support promoting transparency, neutrality, consistency, education and understanding of forensic science. As I have explained, however, the Proposed Rule ignores issues relevant to neutral public laboratories, the high cost of automatic discovery and the existing level of access afforded to litigants in Virginia criminal cases. The issues presented by the Proposed Rule could be addressed by striking the entire text of Proposed Rule 3A:11(d) or, in the alternative, by creating an exception for the Department of Forensic Science. I strongly urge you to consider these issues and amend the Proposed Rule accordingly.

Sincerely,



Peter M. Marone

Director

Department of Forensic Science

wwa

Enclosures

c: The Honorable Marla Decker, Secretary of Public Safety
Charles Quagliato, Office of the Attorney General



Commonwealth of Virginia
DEPARTMENT OF FORENSIC SCIENCE

ORIGINAL
COPY

CERTIFICATE OF ANALYSIS

November 28, 2012

Central Laboratory
700 North 5th Street
Richmond, VA 23219

Tel. No.: (804) 786-4707
Fax: (804) 786-6907

TO:



FS Lab #



Your Case #:



Victim(s):

Suspect(s):



Evidence Submitted By:



Date Received: 10/31/2012

Item 1

One sealed plastic evidence bag containing one knotted plastic bag containing white powder

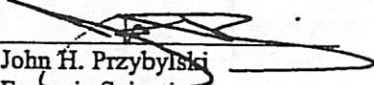
RESULTS:

Item 1

13.7 grams of powder, found to contain Cocaine (Schedule II).

Attest:

I certify that I performed the above analysis or examination as an employee of the Department of Forensic Science and that the above is an accurate record of the results and interpretations of that analysis or examination.


John H. Przybylski
Forensic Scientist

JHP/kd



ASCLD/LAB-International

STATEMENT OF QUALIFICATIONS

Name	John Przybylski	Date	18 September 2012
-------------	-----------------	-------------	-------------------

Laboratory	Virginia Department of Forensic Science, Central Laboratory
-------------------	---

Job Title	Forensic Scientist Section Supervisor
------------------	---------------------------------------

Indicate all disciplines in which you do casework:

- | | |
|--|--|
| ☒ Controlled Substances | ☐ Toxicology |
| ☐ Firearms/Toolmarks | ☐ Biology |
| ☐ Trace Evidence | ☐ Questioned Documents |
| ☐ Latent Prints | ☐ Crime Scene |
| ☐ Digital Evidence | |

List all sub-disciplines in which you do casework:

General Controlled Substance Analysis
--

Education: List all higher academic institutions attended (list high school only if no college degree has been attained)

Institution	Dates Attended	Major	Degree Completed
Virginia Commonwealth University	Aug 1999 - Dec. 2000	CRJS - Forensic Science	M.S.
Virginia Tech	Aug 1994 - May 1996	Biology	B.S.
Hampden-Sydney College	Aug 1992 - May 1994	Biology	N/A (Transferred)

Other Training: List continuing education, workshops, in-service and other formal training received.

-Completed Virginia Institute of Forensic Science and Medicine fellowship in Marijuana/Controlled Substances Analysis - Mar2002 -Completed the Drug Enforcement Administration Forensic Chemist Seminar - Mar2003 -Attended the Agilent 2005 LC and GC Seminar in Sandston, Virginia - Jul2005 -Attended the Omnic FTIR-ATR Instruction Course (In-House) -Aug2005 -Completed the 2005 Basic Methamphetamine Syntheses Technical Seminar sponsored by CLIC - Sep2005 -Completed the ASCLD/LAB-International Assessor Course - Apr2007 -Completed Virginia Department of Human Resources "Essentials of Supervision" -Jun2007

Courtroom Experience: List the discipline(s) in which you have qualified to testify as an expert witness and indicate over what period of time and approximately how many times you have testified in each.

Controlled Substances, 9 Years, 22 Testimonies (VA Circuit Court, VA General District Court, U.S. District Court)

Professional Affiliations: List any professional organizations of which you are or have been a member. Indicate any offices or other positions held and the date(s) of these activities.

Mid-Atlantic Association of Forensic Scientists (MAAFS) Clandestine Laboratory Investigating Chemists (CLIC)
--

Employment History: List all scientific or technical positions held, particularly those related to forensic science. List current position first. Be sure to indicate employer and give a brief summary of principal duties and tenure in each position.

Job Title	Forensic Scientist Section Supervisor	Tenure	Mar 2007 - Present
Employer	Virginia Department of Forensic Science		
Provide a brief description of principal duties:			
Supervise technical and supervisory staff and maintain the daily operations of the Central Lab Controlled Substances section. Analyze unknown substances for controlled substances using various analytical techniques. Prepare accurate reports of analysis and testify in court concerning the results of analysis. Manage section backlog and case assignments. Instruct law enforcement officers in drug recognition and analysis information. Lead and organize training for Forensic Scientist Trainees and newly hired Forensic Scientists.			

Job Title	Forensic Scientist Group Supervisor	Tenure	Dec 2005 - Mar 2007
Employer	Virginia Department of Forensic Science		
Provide a brief description of principal duties:			
Supervise forensic laboratory staff in the controlled substances section. Assist section supervisor in the management of the section backlog as well as routine laboratory activities. Perform analysis of evidence submitted by law enforcement agencies to determine whether or not controlled substances are present. Prepare reports that reflect the results of analyses. Provide testimony as an expert witness. Perform routine maintenance on laboratory instruments. Assist law enforcement agencies in technical matters concerning controlled substances.			

Job Title	Forensic Scientist II	Tenure	Mar 2002 - Dec 2005
Employer	Virginia Division of Forensic Science		
Provide a brief description of principal duties:			
Perform analysis of evidence submitted by law enforcement agencies to determine whether or not controlled substances are present. Prepare reports that reflect the results of analyses. Provide testimony as an expert witness. Perform routine maintenance on laboratory instruments. Assist law enforcement agencies in technical matters concerning controlled substances.			

Job Title	Forensic Laboratory Specialist II	Tenure	Dec 2000 - Mar 2002
Employer	Virginia Division of Forensic Science		
Provide a brief description of principal duties:			
Prepare and conduct quality control of chemical reagent mixtures and standard solutions, perform routine maintenance and QA on laboratory instruments, and maintain inventory of reagents and supplies. Assist forensic scientists with casework by performing wet chemical and instrumental analysis on evidence samples under direct supervision.			

Job Title		Tenure	
Employer			
Provide a brief description of principal duties:			

Other Qualifications: List below any scientific publication and/or presentation you have authored or co-authored, research in which you are or have been involved, academic or other teaching positions you have held, and any other information which you consider relevant to your qualification as a forensic scientist.
(Use additional sheets if necessary.)

- | |
|---|
| <ol style="list-style-type: none"> 1. Virginia Commonwealth University Drug Analysis Instructor
-Sep 02 to May 07 2. Virginia Institute of Forensic Science and Medicine Controlled Substances Instructor
-Sep 04 to Sep 05 3. Virginia Forensic Science Academy Instructor, Controlled Substances |
|---|



ROBERT J. SUROVELL
DOROTHY M. ISAACS*
DAVID M. LEVY
SCOTT A. SUROVELL*
J. CHAPMAN PETERSEN**
CORY FREDERICK GORIUP*
JENNIFER B. BAUMGARTNER
CAMILLE ALLAN CRANDALL
JASON E. BRAUN
NATHAN D. ROZSA
JASON F. ZELLMAN
MICHELE L. JOSEPH
KRISTI CAHOON KELLY*
ERIN E. WITTE
ANDREW R. TANK
ANDREW J. GUZZO
MARGARET B. CRAIG

WRITER'S DIRECT DIAL: 703.277.9750
WRITER'S EMAIL: SSUROVELL@SIPLFIRM.COM

OF COUNSEL
DAVID J. FUDALA*
G. DONALD MARKLE*

* ALSO ADMITTED IN DC
+ ALSO ADMITTED IN MD

January 12, 2013

by email only

Karen A. Gould, Esq.
Virginia State Bar
707 East Main Street, Suite 1500
Richmond, Virginia 23219-2800

re: *Criminal Discovery Rule*

Dear Ms. Gould:

I am writing to express my support of the changes to the Rules of the Supreme Court of Virginia relating to discovery.

From my point of view, they do not go nearly far enough. The proposed changes should apply to all felonies and misdemeanors.

I co-founded a Virginia criminal defense listserve seven years ago which now has over 200 members. I am aware of virtually no opposition to these proposals in the criminal defense bar.

Please do not consider silence from the defense bar to be acquiescence or opposition.

Very Truly Yours,

Scott A. Surovell

BERNHARD & GARDNER

ATTORNEYS AT LAW

6105D ARLINGTON BOULEVARD
FALLS CHURCH, VA 22044

(703) 538-4710
FAX (703) 538-4793

DAVID BERNHARD
VA MD DC MO
Hablo Español

CHERYL E. GARDNER
VA MD DC CO

January 13, 2013

Ms. Karen A. Gould
Executive Director
Virginia State Bar
707 East Main Street, Suite 1500
Richmond, VA 23219

DELIVERED VIA EMAIL

RE: Public comment - Proposed changes to Rule 3A:11

Dear Ms. Gould:

I am the co-chair of the Fairfax County Criminal Law Practice Section, a recipient of the 2012 Leaders in the Law award, and have over 23 years experience practicing criminal law in Virginia. I am also the co-founder and co-moderator of the VADefenses listserv, one of the largest forums for private exchange of information among Virginia criminal defense practitioners. While I address you in an individual capacity only, I bring these credentials to the table to highlight that after involvement in tens of thousands of cases in my career, I have a bit of a relevant vantage point from which to address the proposed changes in the criminal discovery Rule 3A:11.

First of all I would like to address the troubling tenor of the debate being fostered by the manner in which my friends over at the Virginia Association of Commonwealth's Attorneys (hereinafter "VACA") have addressed this issue. I would respectfully point out that VACA was invited by the Bar, and for a time participated constructively in the process of considering amendments to the rule. The rule proposal that emerged reflected compromise and fully addressed the then stated concerns of the VACA representatives. VACA's representatives, two of the most respected prosecutors in Virginia, were for a time allowed to participate in the process of addressing rule changes. It is my understanding that they agreed to the text of the proposed rule and that it reflected consensus arrived at in a spirit of compromise by all stakeholders. After the language was shared with VACA and other attorney groups for comment, VACA in an unfortunate about-face, instructed their representatives to withdraw and take no further part in the crafting of the rule. It is my understanding that VACA's letter to you does not necessarily reflect the views of all prosecutor members of that respected

organization. Certainly, by practice it does not, as there are members who go beyond the requirements of the rule in routinely providing ample discovery to defendants.

This development of VACA's withdrawal from the process was disappointing, for the proposed changes are, if anything, of significant benefit to prosecutors. By leaving the debate, VACA marginalized its role as a partner in improving the system of justice. That role is now further marginalized in an argumentative letter, which essentially advances the false notion that if defendants are given more discovery--presumably all being guilty criminals--they will misuse such discovery to gain unwarranted acquittals. The logic underlying such argument would be the same as for dispensing with the need for defense counsel at all.

I thought until reading VACA's letter there was a consensus among lawyers and the public alike: that unchecked government is not always to be trusted to resist the temptation to engage in an abuse of power. Our founding fathers recognized this concept and our jurisprudence--largely born right here in Virginia--although imperfect, remains the envy of the civilized world. VACA apparently needs to be reminded that, notwithstanding the noble goals of our system, Virginia's criminal jurisprudence is littered with instances of conviction of the innocent, and more recently, with instances of prosecutorial misconduct in the area of discovery practices. One need not address these instances in detail, but I merely note that when prosecutors resign in the face of such allegations or when respected judges in various jurisdictions make findings that such violations exists, we do have a problem.

VACA essentially alleges the sky will be falling with the enactment of the new rule, when not even an apple will alight on its head. The sky has however been falling in some cases where the perception of justice and public confidence in our system of criminal jurisprudence is shaken to the core in the pages of our daily newspapers. The proposed rule is designed to increase confidence in the fairness of the system, buttress the viability of the adversarial system, and yes, benefit prosecutors and defendants substantially.

The rule in the main has two components: greater disclosure by prosecutors with attendant safeguards, and reciprocal expert disclosure. One of the items which would have to be provided under the rule is material police reports, although these could be redacted in a way to protect the identity of witnesses if warranted in particular cases. The benefits of greater disclosure to both sides are obvious, even if the VACA letter attempts to bury these in the weeds of a largely irrelevant dissertation. Both parties will know the facts better leading to enhanced justice and judicial economy: A former judge once told me when he was practicing law, he (as I) loved the civil discovery process because as he was peppered with requests, he learned more about the strengths and weaknesses of his case. In the criminal context, when the defense better knows the weaknesses of its case, there are more pleas and less unnecessary trials. Similarly, when the prosecution engages in vigorous discovery disclosure, they are more apt to be apprised of instances where evidence has been maliciously fabricated by a witness with ill-motive, something which occurs all too often in our system. In short, the more

light shed on the evidence, the greater the chance the darkness of injustice will not descend upon us to undermine the aspirational goal of our system: justice for all.

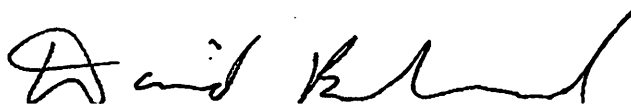
The second main component of the rule, the reciprocal disclosure of experts and designations of their opinions, is an absolutely critical provision and of overriding benefit to the system. At present, Virginia courts are afflicted with a plethora of junk science opinions which often go effectively unchallenged. The rules in Virginia affecting criminal evidence limit what may be used for the impeachment of expert witnesses. Judges for the most part admit most expert opinions in criminal cases, trusting the adversarial system to separate the grain of truth from the chaff of unfounded conclusions. Without advance reciprocal expert disclosure neither side has an effective chance of garnering expert opinion which exposes the junk science nature of the odd opinion. Experts in Virginia essentially can, as it stands today, opine based on the "trust me" concept in criminal cases, without the "verify" part to which former President Reagan so famously alluded in another context. Reciprocal expert disclosure has already worked well in the civil context and there is no reason to believe the same benefits will not be attendant in the criminal sphere. One would think prosecutors would welcome reciprocal discovery rather than continuing the tradition of "ambush by expert" which both sides effectively wield, sometimes to the detriment of justice. VACA does not effectively address this proposed change because it has no logical or empirically valid reasons for opposing what is a commonsense measure to chase junk science from our courtrooms.

The proposed rule changes are relatively modest but important in bringing to Virginia's justice system a more modern and effective adversarial disclosure practice that does not rely primarily upon relationships between counsel or on the personalities of the given moment. VACA need not fear the proposed changes, for they are not reckless experiments fraught with danger. Instead, the changes do little more than partially adopt what is already done with little adverse impact to prosecutors in many venues, as a matter of course. The disclosures sought are already provided in forums as diverse as Maryland, the District of Columbia, Virginia federal, and some Virginia state courts. One of the most respected prosecutor's offices in the state, the City of Alexandria, provides open file discovery and includes access to police reports in felony cases. In my 23 years of practice I am not aware of Alexandria's policy being other than a benefit to their office and to justice as a whole. The dangers of which VACA warns are devoid of persuasive material evidence and in fact are rebutted by decades of practice in places such as Alexandria.

A central role of defense counsel is to be an effective adversary within the bounds of law, thereby keeping the system honest. Most prosecutors are highly dedicated and ethical public servants, but the members of the Bar should ask themselves, do we want to trust justice to the personalities involved, or should we as our founding fathers so wisely directed, foster a system of checks and balances? The new rule enhances the ability of all counsel to keep the system honest. The choice before the Bar is between retaining the current largely ad hoc scheme of discovery or adopting a system which in ensuring greater disclosure and accountability, is of significant benefit to my prosecutor friends, many of whom would acknowledge the

same privately. Please therefore add my small voice to those amongst the Bar who support the enactment of the new rule which will well serve justice.

Respectfully,

A handwritten signature in black ink, appearing to read "David Bernhard". The signature is fluid and cursive, with the first name "David" and last name "Bernhard" clearly distinguishable.

David Bernhard

From: Norman Lamson [<mailto:nlamson@attny.comcastbiz.net>]

Sent: Sunday, January 13, 2013 4:14 PM

To: Gould, Karen

Subject: VSB Indigent Defense Task Force request for comments for proposed amendments to Virginia Supreme Court Rule 3A:11

Dear Indigent Task Force:

I write the following as a comment by a member of the Va. State Bar regarding proposed amendments to Va. Sup. Ct. Rule 3A:11. While I am a member of the Va. Association of Criminal Defense Attorneys, I write in my individual capacity. I oppose the proposed amendments because (1) the Supreme Court has veered too far into acting in a legislative capacity, (2) discovery should be confined to its historical origins of a bill of discovery in equity, and (3) the proposal, by confining itself to circuit court thwarts constitutional requirements of disclosure that should occur at the general district court level.

(1) the Supreme Court has veered too far into acting in a legislative capacity

I agree with Montesquieu that government should be organized into a legislative department, an executive department, and a judicial department, which implies that the business of the legislature is to make the laws, that of the executive is to enforce them, and that of the judiciary is to interpret them. While the Va. Supreme Court does have constitutional authority to make rules of practice and procedure in the lower courts, the power should be exercised sparingly. Instead, the Supreme Court has embarked on an ever increasing tendency of rule-making, that is, acting in a legislative capacity, with the consequence Vol. II is now over an inch thick.

Every minute the Court spends acting in a legislative capacity is time taken away from its acting in a judicial capacity, that is, deciding cases. The increasing level of rule-making by the Court affects the psychological make up of the justices who see themselves more as politicians trying to placate various bar groups and lawyers. The legislature, having the power to create inferior courts, has the implied power to make rules of practice and procedures in those courts, and should be the entity making the proposed rule, not the Va. Supreme Court.

(2) discovery should be confined to its historical origins of a bill of discovery in equity

Discovery began as a particular type of equity bill - the plaintiff potentially had a law action against the defendant, but some inequitable circumstance precluded his maintaining that action. Hence, he sought a bill of discovery to obtain, for example, a document such as a promissory note, that the defendant was holding. Once equity compelled the defendant to transfer the note to the plaintiff, the plaintiff then brought his law action as a separate suit.

From that origin, the concept expanded to the civil law actions. The result has been horrendous. Recently, a federal judge announced upon his retiring that he would devote the rest of his life to combatting the ills that the spread of discovery to civil law actions has generated.

In civil law actions now, with liberal discovery, a case generally works like this: the parties interrogatory each other to death, they then wear themselves out with depositions, and by the time the trial comes about they are both exhausted. One of the peculiar pleasures of practicing criminal law was that one didn't have to deal with discovery. This proposal now seeks to transfer the disease from equity to civil law cases and ultimately over to criminal cases.

The genesis of the proposal is a relaxation of the historical requirements that the indictment contain each essential element of the offense, and that it descend to particulars. If Virginia would recognize these clear constitutional requirements, there would be no need for discovery. The remedy is to reinstate those requirements, and not to remedy the evils brought about by Virginia's failure to recognize them with new discovery rules, which leave the source of the problem unremedied.

(3) the proposal, by confining itself to circuit court, thwarts constitutional requirements of disclosure that should occur at the general district court level.

As Brady and Giglio make plain, the constitution already compels the prosecutor to disclose to the defendant. Since 90% of criminal cases occur by arrest on an arrest warrant prior to indictment, that is the point at which the duty should arise and be honored. A timely disclosure at that point can lead to a plea agreement or reduction of charges to a misdemeanor.

By limiting the time when the prosecutor must act to post indictment in circuit court, the proposal perversely allows the prosecutor to avoid his Brady and Giglio duties by waiting to circuit court to offer information, long after it may do the defendant any good. The rule thus interferes with constitutional duties already extant.

Respectfully submitted,

Norman Lamson
Attorney at law
405 8th Street, NE
Charlottesville, VA 22902
tel. # 434-979-8159
fax # 434-979-8152

10 January 2013

Karen A. Gould, Executive Director
Virginia State Bar
707 E. Main Street, Suite 1500
Richmond, VA 23219

Dear Ms. Gould:

Please consider this letter as the response from the four (4) individual attorneys in the Martinsville Commonwealth's Attorney's Office (MCAO) concerning the Indigent Defense Task Force's ("IDTF") unsolicited proposal to amend Va. R. 3A:11. The MCAO endorses and adopts the official response of the Virginia Association of Commonwealth's Attorneys (VACA), written by the Hon. Michael Doucette of Lynchburg, and encloses its additional opinions on the topic herein.

In the first place, the Indigent Defense Task Force is not the appropriate body to propose any such rule change. The IDTF, according to the Virginia State Bar website, consists of the following individuals:

Alexander Nicholas Levay, Jr., Chair (Private practice; 9 years as Public Defender; never a prosecutor)
Steven David Benjamin (Private practice, frequently criminal defense)
James Orlando Broccoletti (Private practice; no prosecution since 1985)
Harvey Lee Bryant, III (Prosecutor)
John Granville Douglass (Professor; former federal prosecutor)
James R. Ennis (Prosecutor)
Cheryl E. Gardner (Private practice, including criminal defense)
Nina Jean Ginsberg (Private practice, including criminal defense; some prosecution experience)
James M. Hingeley, Jr. (Professor, Public Defender)
Carlos LeMont Hopkins (Private practice; former prosecutor)
Keith Nelson Hurley (Professor, private practice)
Alexander R. Iden (Prosecutor)
David John Johnson (Indigent Defense Commission)
Manuel Enrique Leiva, Jr. (Private practice, former assistant Public Defender)
William Edward Riley, IV (Private practice, criminal defense)
David Brian Rubinstein (Private practice)
Casey Rian Stevens (Private practice, former prosecutor)
John Kenneth Zwerling (Private practice)
Margaret Angela Nelson (Private practice)

RECEIVED

JAN 14 2013

This is a "Task Force" of nineteen individuals, of whom only three are currently practicing as

VIRGINIA STATE BAR

prosecutors. Only by including *former* prosecutors, some of whom have not prosecuted in many years, does the IDTF reach parity of prosecutors and defense attorneys.

A change in the rules for criminal discovery should be written and proposed with equal input from both the equally important segments of our criminal justice system. The IDTF simply does not fit that bill. It is little wonder, then, that the proposed rule has met such strong opposition from the grossly underrepresented side of the criminal law.

Furthermore, we have been unable to find any source requesting, or even authorizing, the IDTF to produce this proposed rule. Indeed, the VSB's news site cites a document which provides "[o]riginal approved recommendations authorizing work on the extant proposal" (<http://www.vsb.org/sites/news/item/idt-prop-3A11>), but the linked document provides no such authorization. The linked document is instead simply a status report from the IDTF, stating merely that "the rules of discovery should be broadened to allow more access to information in a criminal case" while providing no data about a request or authorization for a proposed rule change.

The fact that so little input from prosecutors was permitted in the formulation of this new rule is extremely troubling to the MCAO. Dues to the Virginia State Bar, which support among other things the IDTF, are paid by *all* licensed attorneys, both prosecutors and defense attorneys. The MCAO holds that it is inappropriate for those dues to be expended on a clearly imbalanced committee dedicated to reforming a rule which will have a large impact on all segments of the criminal law.

The rule itself contains nearly as many problems as its formulation. We will recount our objections (those not already stated in VACA's comments on the proposed rule) on each proposed amendment in turn.

Section (a). The language added here is completely unnecessary. It is undisputed that the parties are permitted to provide *more* discovery than is required by the Rule; and indeed, many Commonwealth's Attorneys' offices, including the MCAO, have "open file" discovery policies in place, permitting access to the entirety of the Commonwealth's file excluding only work product. (Anecdotally, many Commonwealth's Attorneys' offices, including the MCAO, have noticed that very few defense attorneys make use of this open file policy.) Additional language reciting what is already universally known is not helpful.

Section (b)(3). While this proposed amendment was already touched upon by VACA's comments, the MCAO holds it to be so important that it requires separate treatment. This amendment would require the Commonwealth to turn over *Brady* material to the defense *upon indictment*. This is burdensome in the extreme, as well as frequently simply impossible. In the case of direct indictments, many defendants do not even have attorneys to whom such material can be delivered. Furthermore, those defendants are not arrested until after their indictments, so it could not even be turned over to the defendant himself. Additionally, at the time of indictment, some exculpatory facts are not even known to the Commonwealth; the proposed rule change makes it more, not less, likely that a prosecutor would mistakenly fail to disclose some exculpatory evidence believing it to have been turned over at the time of indictment, when in reality it had not been because it was not at that time in the prosecutor's file. The current requirement that such evidence be turned over in a timely manner is sufficient; compliance with the proposed rule is not only impossible, but also counterproductive.

Section (c)(2). This proposed amendment, like that in Section (a), is completely unnecessary. The purpose of the current alibi rule is clearly to permit the Commonwealth time to investigate and thereby either confirm or refute the defendant's alibi---possibly saving the cost of a trial in the process and

helping ensure that, whatever the investigation concludes, truth prevails. As such, it is plain that the information explicitly required by this proposed rule is already required by the existing rule.

Furthermore, the proposed rule introduces a new time limit to discovery, fourteen (14) days prior to trial. Discovery is already required ten (10) days before trial, and the ten (10) day requirement is *retained* for Section (c)(1). If a defendant turns over Section (c)(1) discovery along with an alibi notice ten (10) days before trial, the Commonwealth could object to the alibi notice, requiring a continuance for the defendant. This introduction of an additional four days in one case but not the other is arbitrary and only makes the criminal process more prone to time-wasting procedural mistakes.

Section (d). Among the most troubling of the proposed rules, this would require the Commonwealth to notify the defendant of its intent to present expert testimony at least twenty-one (21) days prior to trial, including any written reports of that witness and a complete *curriculum vitae* of that witness. Supplements may then be filed within fourteen (14) days of that original notice.

Not only does this proposed rule introduce still more arbitrary time limits at odds with other time limits for discovery in a criminal case, but it also presents significant burdens to the Commonwealth and not to the defense. The Commonwealth is already required, under the legislation passed to comply with *Melendez*, to file a notice of intent to introduce certificates of analysis in lieu of expert testimony at least twenty-eight days prior to trial. The defendant has fourteen (14) days to object to the admission of that certificate. If the defendant waits ten (10) days prior to trial, then objects to the *Melendez* notice, the Commonwealth would, under this rule, have to file a notice of intent to admit expert testimony; however, while the defendant's objection was timely filed, a notice to present expert testimony at that time would *not* be, and the Commonwealth would have to request a continuance to ensure that it could timely file the twenty-one (21) day notice. This is a waste of time; and given that the defendant certainly already knows that the Commonwealth will present the live testimony of the expert when the certificate will not be admitted, it is a useless waste of time, as well.

Finally, this proposed rule is redundant. The defendant is already entitled under the current Rule 3A:11 to "written reports of autopsies, ballistic tests, fingerprint analyses, handwriting analyses, blood, urine, and breath tests, [and] other scientific reports"; what additional information does this proposed rule gain? Nothing practical; it serves only two purposes:

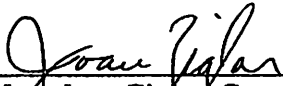
- (1) Obfuscate the process for the Commonwealth; introduce still another arbitrary and conflicting time limit to delay the proceedings or to prevent the admission of good but inculpatory evidence on technical grounds.
- (2) Require the Commonwealth to do work which can be just as easily and effectively done by defense counsel. Having been given the reports, as required already by Va. R. 3A:11(b)(1), the defendant is perfectly capable of obtaining the qualifications of an expert and discussing with the expert the reasons for his opinions. This proposed rule merely requires the Commonwealth to do this necessary work on the defendant's behalf, which the MCAO argues is not an appropriate use of discovery rulemaking.

Section (e). Once again, an arbitrary and conflicting time limit is introduced into the discovery process. There has been no showing that the current discovery limit of "within a reasonable time" is not sufficient to ensure the ends of justice.

In conclusion, the MCAO holds that the proposed rule is unauthorized; produced by a clearly imbalanced body underrepresenting Virginia's prosecutors; and does not serve the ends of justice. It is important to remember that the ends of justice is not limited to fairness for the defendant; it also

encompasses fairness for the Commonwealth. As prosecutors, we are "ministers of truth and justice," and consequently we urge the rejection of this proposed rule, which serves the interests of neither.

Sincerely,



Hon. Joan Ziglar, Commonwealth's Attorney



Donald Goodman
Deputy Assistant Commonwealth's Attorney



Paula Bowen
Assistant Commonwealth's Attorney



Alberto Herrero
Assistant Commonwealth's Attorney



COMMONWEALTH of VIRGINIA

Edward J. Ungvarsky
Capital Defender

CAPITAL DEFENDER UNIT NORTHERN
VIRGINIA REGION
2300 CLARENDON BLVD. SUITE 201B
ARLINGTON, VA 22201

Tel. (703) 875-0103
Fax (703) 875-0115

January 14, 2013

Karen A. Gould
Executive Director
Virginia State Bar
707 E. Main Street, Suite 1500
Richmond, VA 23219

RE: Proposed Amendments to Rule 3A:11

Dear Ms. Gould,

On behalf of the Northern Virginia Capital Defender Office, I write in support of the proposed amendments to Rule 3A:11 of the Rules of the Supreme Court of Virginia. I encourage you to support those amendments that encourage the Commonwealth to provide open file discovery (3A:11(a)), require the Commonwealth to provide copies of police reports (3A:11(b)(2)), and require both parties to provide notice and designation of expert testimony (3A:11(d)). The expanded discovery that would be provided under these proposed amendments is essential to guarantee fairness and justice in criminal trials.

Unfortunately, under the current version of Rule 3A:11, which does not require discovery of police reports, innocent defendants may be wrongfully convicted because prosecutors do not always recognize—or do not always acknowledge—the exculpatory value of police reports. For example, in *Commonwealth v. Justin Wolfe*, the prosecutors did not recognize—or did not acknowledge—the impeachment value of a police report that undermined the testimony of the prosecutors' key witness. In *Wolfe*, the defendant was convicted and sentenced to death for capital murder for hire based on the testimony of the triggerman because the prosecutors did not disclose a police report that recorded the facts that the lead detective planted the murder-for-hire story with the triggerman and threatened him with the death penalty if he did not accuse Wolfe of hiring him. Wolfe's case is not the only case in which a failure to provide police reports has led to a wrongful conviction. Fortunately, something changed after *Wolfe*.

As you are likely aware, capital murder cases are some of the most complex in the criminal justice system. Nonetheless, Rule 3A:11 applies equally – both in its breadth and its limits – in capital cases as it does in non-capital cases. In response to the public and judicial concern over Wolfe's wrongful conviction, my experience is that many Virginia prosecutors have agreed to

provide open file discovery—including discovery of police reports—in all but one of my capital cases. This open file discovery process has proved to be workable in capital cases. Both prosecutors and judges have recognized its value; arguments over hiding the ball and *Brady* are minimized. The case becomes about the facts, with the facts known to both sides. A fair criminal justice system requires no less. Verdicts will be more reliable, and public confidence will be enhanced.

Notably, the proposed amendments largely mirror Rule 16 of the federal rules of criminal discovery. Like many Virginia attorneys, I have experience in the federal courts in addition to the Virginia courts. It is fair to say that no federal judge, prosecutor, or defense attorney would say that the federal criminal discovery rules are remotely onerous or have any possibility of raising any security concerns. To the contrary, the federal rules provide for fairer trials. I recognize that some Virginia prosecutors have expressed some hesitance about the proposal, but, respectfully, I think their concerns are grounded in fear of the unknown, not the practical reality of a fairer and more justice discovery process. Change can cause anxiety, but I am confident that prosecutors will readily adapt to these reasonable proposals. Accordingly, I urge that Virginia's discovery rules are amended to protect defendants' rights and promote just outcomes in all criminal cases, as set forth in the proposal.

It should be recognized that the proposal provides a degree of balance between defense and prosecution perspectives on discovery. For example, the proposal provides for *Brady* disclosure upon indictment, yet the timing of *Brady* material is not so limited under constitutional law. Accordingly, Virginia judges routinely order *Brady* disclosure in General District Court. Finally, I would prefer that the reciprocal alibi provision be deleted not expanded, in light of *Wardius v. Oregon*; however, I recognize its inclusion – just as the provisions for the discovery of police reports – is intended to ensure that true, accurate facts are known to both parties in advance of trial in order to ensure a trial based upon the facts, not speculation and guesswork.

I thank you very much for your time and attention to this matter.

Respectfully Yours,



Edward J. Ungvarsky
VSB 83014

Law Office of Michelle Mathis, PLC.

1035 W 25th St. Suite F6
Norfolk, VA 23517
(757) 502-3175
www.MathisLegal.com
Michelle@MathisLegal.com



January 14, 2013

VIA EMAIL ATTACHMENT TO:
gould@vsb.org

Re: Amendments to VSCR 3A:11

Dear Executive Director Gould,

I am writing in regard to the proposed amendments to Rule 3A:11 of the Virginia Supreme Court recently published for public comment by the Virginia State Bar Indigent Task Force. As a practicing criminal defense attorney in the Commonwealth, I look forward to any positive revision of the state discovery laws. My experience in dealing with prosecutors from the Commonwealth has convinced me of the existence of significant disparity in the degree of legal recourse available to opposing parties in criminal cases.

More specifically, in the day-to-day exercise of discovery procedure, I find there to be a propensity of the courts of Virginia to favor the prosecution in allowing excessively liberal control of the release of potentially exculpatory evidence in criminal cases. This has prompted me to convey my support of the revisions to Rule 3A:11 as submitted by the Task Force. Further, I wish to take the opportunity to include an episode from my career in criminal law in the hope that it may elucidate to those unfamiliar with the current condition of discovery law in Virginia the bias extant in its practice and its detriment to the everyday practice of criminal law.

My favorite part of the proposed change, is the fact that it spells out that exculpatory evidence is anything and everything *favorable* to an accused, it need not rise to the level of a "smoking gun" defense. Last year I represented a young man charged by the Commonwealth with the commission of armed robbery. In an effort to gather the evidence necessary to establish reasonable doubt in the case, I attempted to contact the local police department. This began a circuitous process of evasion of responsibility on the part of both the police authority and prosecution in dealing with the disclosure of evidence, exculpatory or otherwise. A typical exchange with either the police or the prosecution would proceed as follows:

I would send a letter to the police department formally requesting permission to interview the officers involved in the arrest and investigation of my client; the chief of police would respond that I could only interview the officers with

either the consent or physical presence of the Commonwealth prosecutor in the case; I would write to the prosecutor formally requesting to interview the officers with either his permission or physical presence at the interview; in turn, the prosecutor would disclaim responsibility for the actions of the police---the police, he would insist, have autonomy in determining whether to allow access to its officers and records; this process repeated...

My efforts to procure sufficient evidence to represent my client were not limited to such interactions, of course. Fearing wrongful conviction based on lack of discovery, I filed a Brady motion to grant me access to the investigating officers for consultation. This succeeded, I called the Prosecutor's bluff, and he did turn over more information. But on the one point he held firmly on, the judge reaffirmed the terms of discovery agreed to in our joint order. The prosecution, after all, was cooperating. Should they uncover any evidence that could exonerate my client they would dutifully inform me pursuant to the judge's orders. This puts way too much faith in the prosecutors, who use all the wiggle room afforded by the currently weak discovery rules, and seems to own the police departments.

This cycle is apparently accepted practice in Virginia. A number of attorneys I consulted over the course of this case told of similar experiences with Commonwealth prosecutors. This should not be the case. It should not be the condition of discovery law in the Commonwealth such that it is expected of prosecutors to be as uncooperative with the defense as legally permissible. A change needs happen, and the Task Force's amendments are a good beginning.

Sincerely,

A handwritten signature in black ink, appearing to read "Michelle Mathis", written over a horizontal line.

Michelle Mathis, Esq.

Enclosure



COMMONWEALTH of VIRGINIA

TODD G. PETIT
PUBLIC DEFENDER

*Office of the Public Defender
City and County of Fairfax
4103 Chain Bridge Road, Suite 500
Fairfax, Virginia 22030*

TELEPHONE
(703) 934-5600
FAX
(703) 934-5160

January 14, 2013

HEARING IMPAIRED ONLY:
VOICE CALLERS
1-800-828-1140

TEXT TELEPHONE
1-800-828-1120

Karen A. Gould
Executive Director
Virginia State Bar
707 E. Main Street
Suite 1500
Richmond, VA 23219

Re: Amendments to 3A:11 Discovery Requirements

Dear Ms. Gould:

I am writing as the head of the Fairfax County Public Defender's Office. The opinions expressed in this letter do not represent the opinion of the Virginia Indigent Defense Commission or of any other Public Defender's Office in the Commonwealth. I believe that these amendments, while not what I would personally propose, are a reasonable middle ground between what I believe the discovery rules should be and what 3A:11 currently requires.

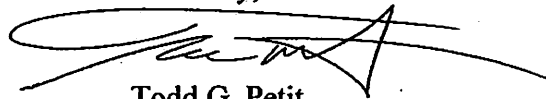
I emailed the 20 attorneys from this office to gauge the trial attorney's position to these amendments. Without exception, the attorneys were pleased with the amendment that finally allowed the defendant access to the police officer reports. The production of these reports will finally alleviate the burden on the Commonwealth of determining whether something in a police report is exculpatory or not. A similar unanimous opinion was that the designation of expert witnesses by the defense was not warranted. The attorneys did not see why they should not have to provide the Commonwealth with a preview of their defense in exchange for getting police reports that almost all jurisdictions already require to be produced to the defendant.

While I am not the most experienced attorney in the Commonwealth, I have been practicing for 15 years, 12 of which have been with this office. What I have learned in this time is that the defense bar will not be successful in going from one of the most restrictive set of discovery rules to one that is "pro-defendant." All that we can hope for is a set of discovery rules that will allow a defendant and the Commonwealth to have a fair trial. The expert designation requirement along with the rest of the proposed amendments will help alleviate the allegations that Virginia's criminal justice system is a jurisdiction that encourages "trial by ambush" and not a process that seeks out justice.

The one objection that I would make is regarding the proposed amendments is the timing requirement. As proposed, discovery motions must be made at least 45 days prior to trial. In Fairfax County Circuit Court, the majority of cases are heard well within 45 days of indictment. In fact, it is not unusual for a trial to be heard within 45 days of the preliminary hearing. Our Circuit Court requires, with limited exceptions, that all cases be set within 60 days of indictment. As not all cases can be heard in the last two weeks of the term, the result will be that the term will have to be expanded to 90 days thus delaying trials. My conversations with Circuit Court's Chief Judge, the Honorable Dennis J. Smith, indicates that the Court also does not believe the 45 day requirement is consistent with the Court's docketing requirements.

As I understand it, these proposed amendments are similar those proposed amendments that a Committee, composed of members of the Commonwealth Attorney's Association as well as members of the defense bar, recommend in 2011. This explains why the proposed amendments offer "benefits" to both the prosecution and defense. As I stated earlier, the proposed amendments are far from perfect but are also a significant step toward guaranteeing a fair trials. It will also have the added benefit of assuring the public that the Commonwealth of Virginia has a criminal justice system whose primary goal is justice not convictions at all costs.

Sincerely,

A handwritten signature in black ink, appearing to read "Todd G. Petit", with a large, stylized flourish extending from the end of the signature.

Todd G. Petit



From: Cynthia Dodge [<mailto:cmcdodge2@gmail.com>]
Sent: Monday, January 14, 2013 9:09 AM
To: Gould, Karen
Subject: Discover rule amendment

Dear Ms. Gould:

I join in the comments sent to you by David Bernhard concerning the proposed amendment to Rule 3A:11. As someone who practiced criminal law in Missouri, I have experience with broader discovery rules. In Missouri, both sides had to provide names, addresses and notes of meetings with witnesses. We were even allowed to depose witnesses. Both sides benefitted from these requirements because the strength of the case for the prosecution and the defense was readily apparent. None of the concerns raised in the letter from the Virginia Association of Commonwealth's Attorneys occurred. Witnesses were not harassed, and defense lawyers did not fabricate defenses. In fact, a fairer, more just trial was obtained.

I support the proposed amendment to discovery.

Cynthia Dodge
Public Defender





From: Robert Frank [<mailto:rfrank@fai.idc.virginia.gov>]

Sent: Monday, January 14, 2013 9:14 AM

To: Gould, Karen

Subject: Proposed discovery rules

As a former prosecutor in Norfolk and current Public Defender in Fairfax, I write in order to endorse the comments of David Bernhard with regard to encouraging the adoption of the proposed rule changes so to foster greater confidence by the public that our criminal justice procedures are fair to all sides. Thank you for your time. Robert E. Frank

From: Jorge Rios-Torres [<mailto:jorge@riostorreslaw.com>]

Sent: Monday, January 14, 2013 1:00 PM

To: Gould, Karen

Subject: Comments to the proposed Amendment to Criminal Discovery Rule 3A:11

Dear Ms. Gould:

Please accept this e-mail as my strong support to Mr. David Bernhard's letter on the subject.

I am a Criminal Law practitioner in Northern Virginia with over 45 years of experience in this area of the law. I started my career as a state prosecutor in my native Puerto Rico in 1968. In 1971, I became an Assistant U.S. Attorney for the District of Puerto Rico. In 1977 I was transferred voluntarily to the Criminal Division of the U.S. Department of Justice in Washington, D.C. in which I worked as a prosecutor, trying cases all over the United States, including the Eastern District of Virginia, in Alexandria, until my retirement in 1997. I give you this background not to brag about my career, but to put my comments in perspective.

After practicing in U.S. District courts in numerous states, where the discovery is conducted in the most civilized way, mostly under the "open file" mode and not in the "trial by ambush" environment presently operating in most of Virginia's state courts, I was thoroughly discouraged to discover the SOP of VA. I could not believe that the State where most of our Founding Fathers were born, who left us a legacy of freedom and equality of rights (slavery aside), would be so incredibly unfair in the handling of criminal cases.

My experience with the "open file" mode has been that more guilty pleas are generated once the defendants find out what they are up against if they go to trial, thus saving valuable time for all involved. This would definitely run contrary to the position adopted by VACA.

Of particular importance to defense counsel in judging whether a case merits "a good fight" in court or not is the availability of police reports to defense counsel as part of discovery. And the sooner this is accomplished, the sooner the case will normally be resolved.

I hope this humble contribution to the debate on Rule 3A:11 will shed some light on the issues and help in the much needed approval of the amendments.

Sincerely,

Jorge Rios-Torres
V.S.B. # 42479
7023 Little River Turnpike
Ste. 208
Annandale, VA 22003
703-593-4717

-----Original Message-----

From: Lindsey Lawson Battaglia [llawsonlaw@gmail.com]

Sent: Monday, January 14, 2013 02:58 PM Eastern Standard Time

To: Gould, Karen

Subject: proposed changes to Rule 3A:11

Dear Ms. Gould:

I am writing to support the proposed amendments to Rule 3A:11 for both ethical reasons and practical reasons.

I practice mostly in Fairfax County which does not supply open discovery. Our jurisdiction has had several cases in recent years be sent back on remand for discovery violations. This is a waste of resources that could be avoided by having open discovery. Even when cases are not remanded for a retrial, discovery violations are frequently raised on appeal. This is another waste of time and resources.

On occasions when I am provided with open discovery, I have found the commonwealth's case to be sound. Reviewing the discovery provided to me allows my client and I to reach an informed decision on whether to plead or go to trial. More often than not, when provided open discovery, my clients have pleaded guilty. This, of course, raises the question of what kind of case the commonwealth has when they balk at providing even the minimal discovery allowed for in Rule 3A:11.

The commonwealth has raised concern that defense counsel can "fabricate a defense" if provided discovery. This is offensive and deliberately (hopefully) ignores both the of defense counsel and the historical evolution of defense counsel. Our job is to stand with our client against the might of the government and to protect Constitutional rights upon which this country was founded. Objections to the proposed amendments ignore the fact that trial rights were developed by our framers because the government was not always right and citizens needed protection from an unchecked government. In other words, the government is not always right.

The proposed changes in rule 3A:11 should not be a threat to the commonwealths' attorneys'. Rather, it would likely streamline the process and ensure the fairness and truthfulness of the government, and ensure truthfulness and accountability in law enforcement which should be our goal.

Please adopt these proposed amendments to rule 3A:11.

Very truly yours,

--

Lindsey Lawson

Law Office of Lindsey Lawson, PLLC

4085 Chain Bridge Road, Suite 401

Fairfax, Virginia 22030

(703) 865-8244

LLawsonLaw@gmail.com

-----Original Message-----

From: Van Hardenbergh [van@vandefense.com]

Sent: Monday, January 14, 2013 05:09 PM Eastern Standard Time

To: Gould, Karen

Cc: 'David Bernhard'

Subject: RE: [VADefenses] Comment on proposed changes to Rule 3A:11

Please add my name to the list of attorneys supporting the proposed changes.

C. Van Hardenbergh

van@vandefense.com

14 East Nelson St., Suite 100

Lexington, VA 24450

540-462-3863

Fax: 540-462-3862

"It is better that ten guilty

escape than one innocent

suffer." - William Blackstone



From: rjobregon@aol.com [mailto:rjobregon@aol.com]
Sent: Monday, January 14, 2013 11:07 PM
To: Gould, Karen
Subject: Proposed Criminal Discovery Rule

Dear Ms. Gould:

I have been a criminal defense practitioner since 1999 and fully support expanded discovery in criminal cases. Justice and fairness demand that Virginia provide for enhanced discovery in criminal cases, just as it does in civil cases. You would be amazed at how perplexed Virginia residents are when I have told that a criminal defendant cannot even obtain a copy of the police report prepared for their case. It seems that most Virginias assume that we have laws similar to Florida's Sunshine Laws and other jurisdictions where this is the norm. I can see how lay persons in Virginia would naturally assume a criminal defendant has sufficient access to information to prepare an adequate defense, considering Virginia is the birthplace of the bill of rights. Very sad state of affairs, indeed.

Also, I endorse Mr. Bernhard's positions contained in his recent letter to you which is attached to this email.

Sincerely,



Raymond J Obregon



DEBORAH CALDWELL-BONO

ATTORNEY AT LAW

302 WASHINGTON AVENUE, S.W. ROANOKE, VIRGINIA 24016

TELEPHONE:
Area Code 540
345-9082

FAX:
Area Code 540
344-6039

January 11, 2013

Karen A. Gould, Executive Director
Virginia State Bar
707 E. Main Street, Suite 1500
Richmond, VA 23219

RE: Proposed changes to Rule of Court 3A:11

Dear Mrs. Gould and fellow members of the Virginia State Bar Council,

Regarding the above, please be advised that I have been practicing criminal law in Virginia since May 11, 1981. My first four years was an Assistant Commonwealth's Attorney for the City of Roanoke. I have been in private practice since; the majority of which practice is defending people charged with crimes.

The clear fact that the current system is not working is set forth in the VACA letter to you dated December 12, 2012 to wit:

" [T]he prosecutor is the best gatekeeper of investigative work product. The prosecutor MAY(emphasis added) and OFTEN DOES (emphasis added) root through the files of the government in order to assure the defendant has the information that he is entitled for his defense."; pg 4(e) of the Virginia Association of Commonwealth's Attorneys dated Dec. 12, 2012, said proclamation clearly evidences that the current system is broken. The evidence garnered by law enforcement must be made available to both sides of the courtroom in a case where life and liberty are at stake.

In a civil case, where basically money is at stake, having one side of the case to have the use of law enforcement to investigate the case and then having that attorney decide whether the other side is allowed even access to that evidence or whether that other side even learns about the evidence would be unconscionable and clearly deemed unfair. In a case wherein life and liberty are at stake, fundamental fairness demands that both sides have access to the evidence to ensure a fair trial.

There is simply an inherent conflict in having one party to a dispute decide whether and what the opposing lawyer should be given. It is unfair to burden the prosecutor with that task. It is unfair to deny the defendant access. The prosecutor is able to view the evidence and argue it as he deems fit; the same should be afforded the accused.

The government's assertions that being fair would lead to dire consequences is contradicted by experience. The federal system provides for full disclosure and has operated for decades without such repercussions. If the government believes that certain information should be withheld from the other side the Judge rules on the issue. Limitations are imposed on

RECEIVED

JAN 15 2013

VIRGINIA STATE BAR

page two

further dissemination of the evidence. Orders directing that copies are not to be provided to third parties nor to be taken from the defense attorney's office unless in counsel's possession provide safeguards against public dissemination.

Those jurisdictions in Virginia wherein the prosecutors elect to provide opposing counsel full access to and copies of documents have suffered no such dire consequences.

I further submit that the VACA's assertion that costs would escalate is questionable. Savings to taxpayers by providing equal access to the evidence in a case would be the more likely result. Consider the money taxpayers spend for court appointed counsel's time to dictate or write word for word the contents of the prosecutor's file (in those jurisdictions which allow open file discovery); the savings to taxpayers by not tying up a Judge, a Prosecutor, a court appointed attorney, a clerk and a couple of courtroom security sheriffs on hearings wherein one side is still trying to get the evidence being withheld by the government. Consider the costs saved taxpayers by wrongful convictions secured by the denial of evidence to both sides...the costs of incarceration, post-trial motions, habeas corpus proceedings, payout to the wrongfully convicted and incarcerated innocent man.

The General Assembly is not going to be considering legislation on this issue when the Committee that reviews proposed bills regarding criminal matters is prosecution oriented and kills any such bill proposed. If the bill never gets out of the committee, the legislators as a whole never have the opportunity to fix the problem.

Fundamental fairness demands equal access to and copies of the evidence. One litigant cannot be gatekeeper of the evidence and decide what and whether to give to the other; there is an inherent conflict. The system IS broken; "...May and often does..", does not comply with the duty of the government nor protect the rights of the accused.

Please know that there are many fine prosecutors in Virginia who share everything in their file and let the chips fall where they may in the trial of a criminal case. They continue with the complete open file process without any such dire consequences as alleged in the VACA letter.

Some prosecutors will even provide copies of the police officer reports and witness statements. They also continue to be able to convict those who should be convicted and agree that justice is served when the innocent go free.

For those who may not be familiar with the criminal justice system it may be helpful to know that all it takes to initiate a criminal prosecution in Virginia is an for individual to go before a magistrate, raise their right hand and swear to tell the truth. A criminal charge is then issued and the case is assigned a prosecutor to prosecute.

The police then gather "evidence" such as witness statements. Thereafter, the prosecutor has total control over the disclosure of such evidence. Whether opposing counsel learns of the statement, has access to the statement or gets copies of the statement is decided by the prosecutor. Defense counsel cannot even get those witnesses statements from the police as the police are deemed to be agents of the Commonwealth.

page three

All of us who defend criminal cases are aware of situations, wherein the prosecutor failed to turn over evidence to defense counsel as he should have. For example, in one of my cases, during trial I stumbled upon the fact that a key witness in the Government's case against my client had provided to the prosecutor a number of tapes which she had secretly recorded conversations between herself and my client. The content of those tapes was clearly exculpatory. When questioned by the Judge as to why the Government had not provided the tapes to me prior to trial, the response from the prosecutor was that he didn't think there was anything exculpatory on the tapes. The Judge agreed with me, that it was law school exculpatory evidence 101 and should have been turned over. During some heated exchanges between myself and the prosecutor in the Judge's chambers, the Judge tried to defuse the situation by simply saying "Mr. _____ hates to lose."

In another case, I had a seasoned prosecutor argue that in order for witness statements to be exculpatory, that if there were a number of witnesses, that the witnesses had to contradict each other for the statements to be exculpatory. It was his stated position that if the same witness made inconsistent statements that such was not exculpatory.

In closing, I refer you to the remarks of a learned jurist who upon experiencing how the current system "works" when a loved one became a defendant in a criminal case, "The paucity of discovery in a criminal case in Virginia is appalling".

I urge you to recommend amendments to Rule 3A:11. It is at least a step in the right direction.

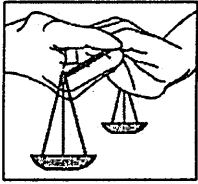
I thank you for your consideration and for your efforts in correcting a very serious injustice in our current criminal justice system.

Respectfully submitted,



Deborah Caldwell-Bono

DCB/tnw



VIRGINIA
VICTIM ASSISTANCE
NETWORK

Further know as:

*Virginia Network for
Victims and Witnesses
of Crime, Inc.*

P.O. Box 4943 Richmond,
Virginia 23220
www.vanetwork.org

*Mindy M. Stell
President*

*Vacant
1st Vice President*

*Shannon Freeman
2nd Vice President*

*Mary Anne Freshwater
Secretary*

*Joyce Walsh
Treasurer*

January 15, 2013

Karen A. Gould, Executive Director
Virginia State Bar
707 E. Main Street, Suite 1500
Richmond, VA 23219

RE: PUBLIC COMMENT CONCERNING PROPOSED RULE CHANGE TO
VIRGINIA RULE OF COURT 3A:11

Dear Ms. Gould:

Please allow this letter to serve as the position of the Virginia Victim Assistance Network, further known as the Virginia Network for Victims and Witnesses of Crime, Inc. ("The Network") in the matter of the Indigent Defense Task Force's ("IDTF") draft of a proposed new rule concerning discovery in criminal cases. Thank you for your time and the opportunity to comment on this proposed rule change.

The Network is a statewide cadre of professionals who strive to minimize the impact of crime victims and witnesses, by ensuring that the rights of victims and witnesses are met. The Network strives to minimize the physical, financial, emotional and social consequences of crime on individuals, families and communities. Members of the Network include victim advocates, commonwealth attorneys, law enforcement, social services and other agencies throughout the Commonwealth.

As such, the Network objects to the proposed changes to Rule 3A:11 as it would detrimentally impact victim and witness safety as well as their willingness to cooperate in the report, investigation and prosecution of criminal cases. The Rule would be particularly detrimental in domestic violence and sexual assault cases and we have serious concerns this rule change will have a chilling effect on victims and witnesses in these cases.

The proposed rule change would require that all statements and identifying information of a victim or witness be given to the defendant. There is a provision in the drafted rule change allowing for the Commonwealth to withhold that information if necessary to protect the safety of a witness and his or her family.



However, a defendant may petition the court to get the identifying information despite these safety concerns. There are no procedural guidelines for how a defendant may get this information or a standard set that he must meet for the court to order this.

The defendant certainly has a right to confront his accusers and that is the current law. Adding in this provision requiring victim and witness addresses to be made known to the defendant when they have concerns for their safety is dangerous. Victims of domestic violence who relocate and want to get away from their abuser do not want the abuser to find them. The same goes for victims of sexual assault who have suffered one of the most invasive violations of their person.

The current law requires prosecutors to give exculpatory information to the defendant. If a witness or victim makes a statement that is given in confidence to the prosecutor or one of her agents that is not exculpatory, there is no need to require the prosecutor to allow inspections of these statements. Victims and witnesses are currently told their statements are confidential with the noted exception for exculpatory information. If a victim or witness is aware that all statements he or she makes will be made available to the defendant, it is our concern this will cause many victims and witnesses to withhold relevant information, not report crimes, or participate in investigation or prosecution.

As the proposed rule change stands, it is too vague and broad regarding the release of victim and witness identifying information and statements. These changes are unnecessary and have a great potential to silence victims and witnesses.



Thanking you in advance, for allowing the Network to provide our position on the IDTF's proposed 3A:11 rule change.

Sincerely,

Mindy M. Stell, President
Virginia Victim Assistance Network

January 15, 2013

Karen Gould
Executive Director
Virginia State Bar
707 E. Main Street
Richmond, VA 23229

Send by email on January 15, 2013

Re: Proposal to Council for Amendment of 3A:11

Dear Karen:

Thank you for receiving this letter as a response to your request for input on the Indigent Defense Task Force (IDTF) proposal for amendment of Supreme Court Rule 3A:11. This letter is submitted in support of the proposed amendment to the Rule and also to provide background information which may assist Bar Council members for the discussion.

Unfortunately, I must be absent from the meeting of Bar Council in February due to a change in my international flight schedule for our long-planned family vacation. I felt it prudent to provide this information since I will not be available for recitation at Bar Council.

First, by way of background, I am an appointed At-Large Member of Bar Council (2007-13), an appointed member of the Indigent Defense Task Force of the Virginia State Bar (2009 -) (by then President Jon Huddleston - See Attachment 1), and an appointed member of the Special Committee on Access to Legal Services (Access Committee) for the VSB (2007-13). I served as Chair of the Access Committee from 2009 - 2010.

It has come to my attention that the authenticity of the IDTF has been challenged. The attached list illuminates the membership and I have no reason to believe that other members of the Indigent Defense Task Force failed to receive their appropriate appointments from then VSB President Jon Huddleston. The bipartisan, multilateral composition of the Indigent Defense Task Force list is self explanatory. (See attachment 2)

The following is my best recollection of the events from just over three years ago. In the fall of 2009, the Virginia State Bar's Special Committee on Access to Legal Services requested for the leadership of the Access Committee to engage VSB leadership in discussions concerning the unfinished matters that had been pending from the IDTF from the 2004 Bar Council vote. Subsequently, President Jon Huddleston invited members of the legal community across the Commonwealth, by letter, to join a continuing group of IDTF attorney members for that task. Criminal discovery in Virginia was the final part of the indigent defense proposal approved by Bar Council in 2004 which had been left incomplete. As a point of information, in 2009, by the progress of time, several 2004 IDTF members were replaced due to change of circumstance (retirement, judicial appointment, death, or change of employment, etc.).

I include the pertinent statements in the **VSB Special Committee on Access To Legal Services Annual Report, 2009 -2010**. [The formatting below follows the objectives of the Access Committee's strategic plan.]

Goal 1) Promote development of a statewide system of effective and high quality legal services in collaboration with legal aid and community organization.

(a) ...

(b) The (Access) committee recommended that the VSB Indigent Defense Task Force be reconvened to explore discovery issues in criminal cases. The IDTF was created by Council to operate under the auspices of the committee in 2004. Many earlier recommendations proposed by the IDTF have been implemented. However a remaining consideration is reciprocal open file-discovery (and whether greater initial sharing of pertinent information might enhance fiscals for the justice system as a whole.) The Task Force's current three working groups include a vigorous Commonwealth's Attorney Subcommittee. The goodwill engendered between the prosecutor and defense communities engage in subcommittee efforts has favorably impacted outside endeavors. For example, an upcoming issue of the Virginia Lawyer is slated to feature a jointly-authored article by representatives of these two communities. They are cooperating with VDCJS on a grant application under the federal *John R. Justice Act* for partial forgiveness of law school loans incurred by Virginia defenders and prosecutors.

.....

In 2009 –2010, I chaired the Access Committee and in the spring of 2010, was invited to join the IDTF. The reorganized 2010 IDTF included three Commonwealth's Attorneys nominated by the Virginia Association of Commonwealth's Attorneys. Those three prosecutors participated in the spirited discussions and were part of each draft and vote of this IDTF proposal. The proposal, as submitted by the IDTF, has not been amended since the IDTF made its recommendations in 2011 with its full complement of membership (prosecutors, a criminal law professor, certified court appointed indigent defense attorneys, private defense council, public defenders, member and former member of the Indigent Defense Commission, and representatives of the Indigent Defense Commission staff – See Attachment 2).

As the liaison to the Access Committee from the IDTF since 2009, I have reported IDTF's work and progress to the Access Committee on an ongoing basis.

As an aside, it took over six months for the IDTF to reach a full complement of bipartisan and multilateral members before we could get to the heart of our business in the spring of 2010. Finally, in the summer of 2011, after a year and a half of work in committees and subcommittees, the final vote was taken. Many current Bar Council members will recall that

Alex Levay presented a draft of the proposal to the Annual Meeting of the Bar Council on June 16, 2011 to keep Council advised of the Task Force's activities and potential plans.

I support the proposal. Additionally, I am aware of the comments from the Standing Committee on Ethics concerning the recent LEO. Therefore, I recommend that a redraft of the IDTF proposal should be made with input from the Standing Committee on Ethics.

I am disappointed to miss this meeting of Bar Council. In my sixth and final year on Council, I have had a perfect attendance record and regret that I could not control the circumstances here. I will be available in advance of the meeting at Bar Council dinner the evening prior should members have questions they would like to clarify with me.

Sincerely yours,

Margaret A. Nelson
Law Offices
716 Court Street
Lynchburg, VA 24504
(434) 528 1078 x102
(434) 845 -0510

Jon D. Huddleston, President
Sevila, Saunders, Huddleston & White, P.C.
P.O. Box 678
Leesburg, VA 20178-0678
Telephone: (703) 777-5700

Irving M. Blank, Esq., President-elect
ParisBlank, LLP
1st Floor
1804 Staples Mill Road
Richmond, VA 23230
Telephone: (804) 355-0691

Manuel A. Capsalis, Immediate Past President
Capsalis, Bruce, Reaser, & Caulkins, P.L.C.
2200 Wilson Boulevard, Suite 800
Arlington, VA 22201
Telephone: (703) 358-9620



Virginia State Bar

Eighth and Main Building
707 East Main Street, Suite 1500
Richmond, Virginia 23219-2800
Telephone: (804) 775-0500

Facsimile: (804) 775-0501 TDD (804) 775-0502

Karen A. Gould
Executive Director and
Chief Operating Officer

Mary Yancey Spencer
Deputy Executive Director

Elizabeth L. Keller
Assistant Executive Director
for Bar Services

Susan C. Busch
Assistant Executive Director
for Administration

Edward L. Davis
Bar Counsel

March 23, 2010

Margaret Angela Nelson, Esq.
716 Court Street
Lynchburg, VA 24504

Re: Virginia State Bar Indigent Defense Task Force

Dear Ms. Nelson:

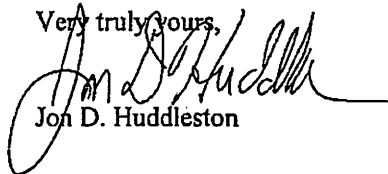
It is my pleasure to appoint you to the VSB Indigent Defense Task Force as it reconvenes in 2010 to further address earlier recommendations concerning criminal discovery in Virginia.

As indicated on the attached draft roster, the Task Force Chair continues to be Alexander N. ("Alex") Levay, Jr. Maureen Petrini, VSB Access to Legal Services Director, will serve as staff liaison. She will be contacting you about the work of the Task Force and will advise you of Task Force meeting dates.

The Task Force *Status Report to Bar Council*, referencing discovery matters (p. 2), is posted at <http://www.vsb.org/docs/sections/criminal/taskforce904.pdf>.

Thank you for your willingness to be of additional service to the bar. I look forward to working with you and appreciate the endeavor of the Task Force to improve the process of discovery in criminal cases in the Commonwealth.

Very truly yours,



Jon D. Huddleston

JDH:mkp

Enclosure-Draft Roster

c: Irving M. Blank, Esq.
Alexander N. Levay Jr.
Karen A. Gould, Esq.
Margaret A. Nelson, Esq.
Maureen K. Petrini, Esq.

DRAFT

**Virginia State Bar Indigent Defense Task Force
2010**

Alexander Nicholas Levay, Jr., Chair
Alex Levay, Attorney, PLLC
29 North King Street
Leesburg, VA 20176
Phone: 703-777-6801
Fax: 703-777-8429
Email: alexlevay@yahoo.com

Steven David Benjamin, Esq.
Benjamin & DesPortes, PC
Suite 302, 11 S. 12th Street
P.O. Box 2464
Richmond, VA 23218-2464
Phone: 804-788-4444
Fax: 804-644-4512
Email: sdbenjamin@aol.com

James Orlando Broccoletti, Esq.
Zoby & Broccoletti, P.C.
6663 Stoney Point South
Norfolk, VA 23502-3917
Phone: 757-466-0750
Fax: 757-466-5026
Email: james@zobybroccoletti.com

The Honorable Harvey Lee Bryant, III
Commonwealth's Attorney
City of Virginia Beach
Building 10B 2nd Floor
2425 Nimmo Parkway
Virginia Beach, VA 23456-9050
Phone: 757-385-8978
Fax: 757-427-0178
Email: hbryant@vbgov.com

Dean John Granville Douglass
T.C. Williams School of Law
University of Richmond
Richmond, VA 23173
Phone: 804-289-8198
Email: jdougla2@richmond.edu

The Honorable James R. Ennis
Commonwealth's Attorney
Prince Edward County
P.O. Box 266
Farmville, VA 23901
Phone: 434-392-1902
Fax: 434-392-4700
Email: jennies@kinex.net

Cheryl E. Gardner, Esq.
Bernhard, Gardner & Mickelsen
6105-D Arlington Boulevard
Falls Church, VA 22044
Phone: 703-538-4710
Fax: 703-940-9175
Email: bern3gard@mindspring.com

Nina Jean Ginsberg, Esq.
DiMuro Ginsberg P.C.
908 King Street, Suite 200
Alexandria, VA 22314-3018
Phone: 703-684-4333
Fax: 703-548-3181
Email: nginsberg@dimuro.com

James M. Hingeley, Jr., Esq.
Office of the Public Defender
409 Third Street, NE
Charlottesville, VA 22902
Phone: 434-951-6300
Fax: 434-951-6444
Email: jhingeley@idc.virginia.gov

Carlos LeMont Hopkins, Esq.
Virginia Indigent Defense Commission
Suite 109
1604 Santa Rosa Road
Richmond, VA 23229
Phone: 804-662-7249
Fax: 804-662-7359
Email: chopkins@idc.virginia.gov

5/20/10

Keith Nelson Hurley, Esq.
Keith N. Hurley, P.C.
2727 McRae Road
Richmond, VA 23235
Phone: 804-323-9735
Fax: 804-323-9733
Email: kehurley@aol.com

The Honorable Alexander R. Iden
Commonwealth's Attorney
City of Winchester
5 North Kent Street
Winchester, VA 22601
Phone: 540-667-5770
Fax: 540-665-9087
Email: aiden@ci.winchester.va.us

David John Johnson, Esq.
Virginia Indigent Defense Commission
Suite 109
1604 Santa Rosa Road
Richmond, VA 23229
Phone: 804-662-7249 ext. 18
Fax: 804-662-7359
Email: djohnson@idc.virginia.gov

Manuel Enrique Leiva, Jr., Esq.
Leiva & Marks, P.L.C.
4011 Chain Bridge Road
Fairfax, VA 22030
Phone: 703-352-6400
Fax: 703-352-5226
Email: mleiva@leivamarkslaw.com

William Edward Riley, IV, Esq.
Riley & Wells
2201 Libbie Avenue
Richmond, VA 23230
Phone: 804-673-7111
Fax: 804-673-7115
Email: eriley@rileywells.com

David Brian Rubinstein, Esq.
1210 Kenmore Avenue
Fredericksburg, VA 22401
Phone: 540-373-0558
Fax: 540-373-0906
Email: davidbr3@msn.com

Casey Rian Stevens, Esq.
Casey R. Stevens, P.C.
Suite A
4311 Ridgewood Center Drive
Woodbridge, VA 22192
Phone: 703-897-1777
Fax: 703-897-0077
Email: casey@caseystevens.com

John Kenneth Zwerling, Esq.
Zwerling, Leibig & Moseley, P.C.
108 North Alfred Street
Alexandria, VA 22314
Phone: 703-684-8000
Fax: 703-684-9700
Email: jz@zwerling.com

Margaret Angela Nelson, Esq.*
716 Court Street
Lynchburg, VA 24504
Phone: 434-528-1078
Fax: 434-845-0510
Email: manelsonlaw@gmail.com
*(*Representative, VSB Special Committee on
Access to Legal Services)*

From: Blake Woloson [<mailto:bkwooloson@aim.com>]

Sent: Tuesday, January 15, 2013 3:10 PM

To: Gould, Karen

Subject: Fwd: [VADefenses] Comment on proposed changes to Rule 3A:11

Dear Ms. Gould:

Enclosed please find a copy of the letter written by David Bernhard on the proposed changes to Rule 3A:11. As a practicing criminal defense attorney for the last 23 years throughout Virginia but primarily in the courts of Northern Virginia, I wholeheartedly agree with Mr. Bernhard's analysis.

Sincerely,

Blake Woloson, Esq.



Virginia Association of Criminal Defense Lawyers

3126 W. Cary Street, #615, Richmond, Virginia 23221

Tel. (804) 262-8223 Toll Free: (877) 262-8223 (262-VACD)

Fax (804) 262-8225

Website: www.vacdl.org

Email: vacdlawyers@gmail.com

January 10, 2013

Karen A. Gould, Executive Director
Virginia State Bar
707 East Main Street, Suite 1500
Richmond, Virginia 23219

Re: Comment on Proposed Amendments to Rule 3A:11

Dear Ms. Gould:

The Virginia Association of Criminal Defense Lawyers (VACDL) is a state-wide voluntary association of the best and most-experienced criminal defense lawyers in the Commonwealth. As President of VACDL, I write to convey VACDL's thoughts on the amendments to Rule 3A:11 proposed by the Indigent Defense Task Force and which the Bar circulated for comment on October 25, 2012.

As the Bar is undoubtedly aware, the current discovery mechanism under Rule 3A:11 is inadequate to ensure the constitutional rights of persons charged with crimes are adequately protected, particularly their due process right to defend themselves guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and the Virginia Constitution. Although the proposed amendments to Rule 3A:11 leave something to be desired, they represent a huge step forward.

First, paragraph (b)(2) perpetuates the existing unworkable requirement that defense counsel be able to demonstrate materiality before being entitled to the materials referred to therein. It is impossible to demonstrate materiality of something in the prosecutor's file without knowing precisely what the file contains.

Second, under paragraph (e), a defense motion for discovery must be made at least 45 days before trial and subsequent motions may be made "only upon a showing of cause why such motion would be in the interest of justice." The 45-day rule will result in trials being scheduled later so a discovery motion can be filed in a timely fashion.

RECEIVED

JAN 14 2013

VIRGINIA STATE BAR

Also, if the initial round of discovery produces additional matters into which an accused's counsel must inquire, the limitation on subsequent motions may prevent inquiry into these matters.

Third, although paragraph (c) of the proposed rule imposes time limits within which the accused must provide his (or her) reciprocal discovery, the proposed rule does not contain any time limits within which the prosecutor must provide its discovery.

Finally, subparagraph (c)(2) requires an accused asserting an alibi defense to provide prosecutors with the names and addresses of corroborating witnesses. However, prosecutors continue to have no obligation to inform the accused of the identity of the witnesses against him (or her).

Although the proposed rule is not perfect, it represents a great step forward in the long-overdue demise of trial by ambush in criminal prosecutions in the Commonwealth. VACDL strongly recommends, with the needed corrections suggested herein, the Bar recommend to the Supreme Court it adopt the amendments to Rule 3A:11.

Other states have adopted meaningful discovery rules such as those contained in the proposed rule and have not, to our knowledge, suffered any significant inability to fully prosecute criminal charges. A summary of the discovery laws/rules of several other states is attached.

Similarly, the federal system has experienced no adverse results from full disclosure of all of the evidence prior to trial. If the federal prosecutor believes certain information should be withheld, he/she seeks a protective order from the judge and the true arbiter makes the necessary ruling.

Likewise, those Virginia prosecutors who provide full access and copies of documents have not suffered the dire consequences voiced by their colleagues in VACA's letter.

VACDL believes the procedures in the proposed rule further judicial economy because more complete pre-trial discovery more readily allows the parties to identify those cases that do not need to be tried, either because the complete evidence is so compelling or because there are such significant defects in the evidence a trial would likely result in an acquittal. Furthermore, more complete pre-trial discovery leads to "cleaner" trials, reducing the likelihood of incarcerating an innocent individual, the incidence of *habeas corpus* petitions, and taxpayer payments to the wrongfully convicted.

VACDL is aware the Bar recently issued Legal Ethics Opinion 1862, which addresses the ethical responsibility of prosecutors under Rule 3.8, Rules of Professional Conduct. The opinion addresses the ethical responsibility of prosecutors to act as ministers of justice and to disclose exculpatory information beyond that required under the constitutional mandate of *Brady v. Maryland*. The proposed amendments to the rule are a natural extension of this recent Legal Ethics Opinion and make it easier to ascertain whether prosecutors are faithfully discharging their duties.

VACDL is also aware the Virginia Association of Commonwealth's Attorneys (VACA) has submitted its comments by letter dated December 12, 2012. It is not beneficial to the current discussion to provide VACDL's comments in a point-by-point fashion in response to the points raised by VACA. However, I do wish to address several portions of the VACA letter.

In its Statement of General Objection, VACA states the proposal is both "a radical and unnecessary departure from long standing criminal practice." It also states this would be "more appropriately considered by either the General Assembly or the Virginia Supreme Court." While the proposal may be considered radical by some, VACDL strongly disagrees it is unnecessary, particularly in view of the increasing number of recent cases highlighting the uneven playing field caused by defense counsels' inability to receive all information necessary to ensure an accused's constitutional rights are protected. Also, VACDL understands the proposed amendments are intended to be presented to the Virginia Supreme Court for its consideration and possible adoption, thus addressing VACA's concerns. Given several members of the General Assembly are prosecutors, who have a vested interest in maintaining the *status quo*, the legislature is not the proper forum for consideration of the current proposal.

In addition to the "two tracks" referred to in the VACA letter, there is a third "track" the VACA letter does not mention, specifically, Rule 3.8 of the Rules of Professional Conduct, which imposes additional ethical responsibilities on prosecutors. As indicated above, the proposed amendments to the Rule are consistent with the Bar's recognition of prosecutors' duties under LEO 1862.

It should shock the conscience of every Virginian that a litigant's right to discover evidence in the possession of the other party is broader when one is involved in civil litigation than when the litigant's freedom and liberty are at stake. Far from being merely "anecdotal suggestions," as dismissively categorized by VACA, discovery abuses by prosecutors and their failure to disclose exculpatory evidence has been documented by an increasing number of judicial decisions in the Commonwealth's state and federal courts. It is offensive to hear that, because the prosecution has the burden of proof beyond a reasonable doubt, a new discovery rule that provides a large portion of the prosecutor's file "is an advantage that is unnecessary and unfair."

Fundamental fairness demands equal access to and copies of the evidence in the criminal court just as much as it does in the civil court.

Two of the better known recent examples of prosecutorial misconduct that shout out the need for discovery reform are *Hash v. Johnson*, 845 F. Supp.2d 711 (W.D. Va. 2012) and *Wolfe v. Clark*, 691 F.3d 410 (4th Cir. 2012). In *Hash*, the district court found a "cavalcade of evidence...demonstrating police and prosecutorial misconduct, which largely stands uncontested by Respondent." This finding led, among other things, to the resignation of the Commonwealth's Attorney for Culpeper County. In *Wolfe*, the Fourth Circuit upheld the district court's finding of "manifold violations" of Wolfe's right to be informed of exculpatory (Brady) information. It also agreed with the district court the Virginia prosecutor had "knowingly presented false testimony" by a key witness.

VACA's concern that the Bar's recent Legal Ethics Opinion 1864 might enable defense lawyers to circulate sensitive information to parties who should not have it misstates the point of that LEO. The LEO specifically authorizes defense counsel to agree to receive some information from the prosecutor upon the promise he will not copy it, make it available to the defendant, or make it a part of the client's file.

The current prevailing atmosphere in the Commonwealth's criminal justice system values the obtaining of criminal convictions over the due process rights of the citizens. A change in this atmosphere will only be effective if it comes from "the top" down, namely from the Virginia State Bar and the Supreme Court of Virginia. Again, VACDL strongly urges the Bar to recommend to the Court the proposed amendments to Rule 3A:11 be adopted by the Court.

In closing, I would note the Bar, when defending its disciplinary system, maintains vigorous prosecution of "bad" lawyers is a necessary component of being the only self-regulated profession in the Commonwealth. The Bar's systematic failure to vigorously pursue complaints against "bad" prosecutors has fostered among them the sense they can violate citizens' rights with impunity. If the federal courts to which Virginia *habeas* cases are appealed continue to find prosecutorial misconduct, as in *Wolfe* and *Hash*, the Bar may lose its ability to self-regulate the profession and influence the course of criminal procedure, much like the interrogation procedures in Arizona that ultimately led to the *Miranda* decision in the 1960s.

Karen A. Gould, Executive Director

January 10, 2013

Page 5

You may reach me more quickly and conveniently by calling me at 434-846-3348; by writing to 105 Archway Court, Lynchburg, VA 24502; or by e-mail at bleighd@verizon.net. Thank you for the opportunity to comment on the proposed amendments.

Sincerely,



B. Leigh Drewry, Jr., President
Virginia Association of Criminal Defense Lawyers

CRIMINAL DISCOVERY RULES IN OTHER STATES

Georgia

- Witness list provided along with the indictment at arraignment – O.C.G.A § 17-16-3
- Witness statements no later than 10 days prior to trial – O.C.G.A. § 17-16-7

West Virginia

- Requires production of witness list upon motion of the Defendant – W.Va. Rules of Criminal Discovery Rule 16(F)
- Requires production of witness statements once the witness has testified – W.Va. Rule 26.2
- Allows for Depositions in certain circumstances – W.Va. Rule 15

North Carolina

- State must provide “The complete files of all law enforcement agencies, investigatory agencies and prosecutors’ offices involved in the investigation of the crime.” North Carolina General Statutes § 15A-903(a)(1)

Tennessee

- Requires a witness list on the indictment – Tennessee Code Ann. § 40-13-107
- State is required to provide all tangible documents that is material for preparing the defense – Tennessee Criminal Rule of Procedure Rule 16(a)(1)(F)

Florida

- Witness list must be provided within 15 days of filing discovery – Florida Rules of Criminal Procedure Rule 3.220(b)(1)(A)
- Witness statements must be provided at the same time – Rule 3.220(b)(1)(B)
- Police Reports are discoverable – Rule 3.220(b)(2)
- Depositions of witnesses are permitted – Rule 3.220(h)

Kentucky

- Witness list and statements must be provided at least 48 hours prior to trial – Ky. Criminal Rule 7.26(1)
- Police reports are discoverable upon showing of possible materiality – Ky. Criminal Rule 7.24(2)

Massachusetts

- Commonwealth must provide names, addresses and DOB for all prospective witnesses other than LEO prior to pretrial conference. – Mass. Rules of Criminal Procedure Rule 14(a)(1)(A)(iv)
- Provide access to all relevant police reports – Rule 14(a)(1)(A)(vii)

Pennsylvania

- Upon motion of the defendant court may order the prosecution to provide the names and addresses of witnesses; all oral or written statements of the witnesses and any other evidence which would be in the interests of justice – Pennsylvania Rules of Criminal Procedure Rule 573(B)(2)(a)(i)
- In the interest of justice, court may order production of all information concerning the case including police reports

American Bar Association, Criminal Justice Discovery Standards

- Witness list to be provided – ABA Standard 11-2.1(a)(ii)
- Witness statements to be provided – ABA Standard 11-2.1(a)(ii)

Amy Stitzel
5945 10th Rd. North
Arlington, Virginia 22205

Ms. Karen A. Gould DELIVERED VIA EMAIL
Executive Director
Virginia State Bar
707 East Main Street, Suite 1500
Richmond, VA 23219
gould@vsb.org

RE: *Public comment - Proposed changes to Rule 3A:11*

Dear Ms. Gould:

I am an assistant public defender in Arlington County since the office opened in 2005. I am writing as a concerned citizen with experience as a defense attorney and intern experience at an Office of the Commonwealth's Attorney, not as a representative of the Office of the Public Defender for Arlington County and Falls Church.

Overall, I am impressed with the improvements to the proposed rule. I appreciate that a committee dedicated so much time and effort to changing our discovery process in the Commonwealth. I understand the committee also sought input from prosecutors, but those prosecutors did not remain on the committee. Many people are genuinely surprised when they learn that defendants in the Commonwealth do not get police reports as a matter of course. Besides defendants and their families, a number of prosecutors in other states and jurors on my trials have expressed surprise at this practice. Further, in my experience, jurisdictions that have more expansive discovery (federal system, Alexandria and Arlington open file cases) have more guilty pleas comparatively than trials. I have heard jurisdictions that do not provide discovery have trials for discovery purposes. This is a risky way for both sides to practice and does not seek justice. Moreover, it is a disgrace that in civil litigants have more access to discovery than criminal litigants where liberty is at stake.

I am concerned that the accused would be required to give names and addresses of any witness. First, it does not seem to be an equal discovery burden as the prosecution is not required to give names and addresses of

witnesses (for victim protection and to prevent intimidation). Second, I think the notice of alibi is sufficient in its current form and have not heard of any prosecutor in Arlington being surprised and unprepared to fight an alibi defense.

I was very surprised at the December 12, 2012 Virginia Association of Commonwealth's Attorneys response to the proposed rule and ask you to give it little weight.

First, I do not believe all Commonwealth's Attorneys would agree with the objections. The Commonwealth's Attorneys in Arlington and Alexandria have an open file policy on most cases that goes beyond the current discovery rule.

Second, it is disingenuous to cite numerous objections that have not materialized that I am aware in any actual case where the accused has received more information that is allowed under the current rule:

- For example, the VACA claims witnesses will be chilled if their identities are known to an accused. (Section c) Well, witnesses are already required to identify themselves in court, so there is no additional chilling effect.
- The VACA claims undue advantage to the accused. (Section d) Our system is created with protections for the accused, not the Commonwealth, because our country decided it was important to protect these rights for an innocent person as well as a guilty person. Further, it does not make sense to me that allowing an accused to know the evidence against him before trial puts him at advantage. It sounds like due process to me, which our country requires.
- VACA claims dangerous and disturbing dissemination of victim information including disseminating information to gang members and posting videos of molested children on YouTube. (Section f). These are concerning and VACA claims it happened to one prosecutor. There are other methods in place to allow expanded discovery to the accused and also to prevent this dissemination. E.g. protective orders against dissemination.
- VACA claims a negative fiscal impact (section g). Giving copies of police reports sounds a lot more efficient than defense attorneys spending hours copying information by hand or prosecutors spending hours sifting through what to give and what to hide and even more time redacting.

- Timing of discovery. (section h). The general idea is to encourage dissemination instead of hiding of Brady material. If VACA has a suggestion on how to make this deadline clear, as opposed to just not requiring it, I am willing to listen.
- Unbalanced treatment (section i). Again, our system was created to make the burden difficult. It seems VACA wants to change that proposition. Moreover, the proposed rule does require defense reciprocal discovery.

Third, it is disrespectful to defense attorneys to suggest allowing the accused to view police reports would create fabrications of defenses. It is unethical for a defense attorney to allow a defendant to fabricate a defense on the stand. If an accused changes his or her defense or "story" after seeing a police report, the defense attorney cannot ethically allow the accused to tell this new, changed story under oath. Moreover, well-respected judges already admonished Commonwealth's Attorneys in the Wolfe case for using "fabrication of a defense" as the basis for withholding information from the accused. VACA claim that defense attorneys would allow defendants to fabricate a defense after discovery has been shared with the accused is unsubstantiated. Moreover, it seems more logical that sharing of more information would create informed decision-making and more guilty pleas by an accused instead of a slippery slope of persuasive fabrications made at trial. Lastly, VACA should be concerned at the public perception on the integrity of our justice system. It is concerning that so many people have been proven to be innocent after being found guilty when decisions regarding dissemination of information to an accused were left only to prosecutors and VACA should not be able to rest until more is done to correct these injustices.

Thank you for your consideration of my comments.

Amy Stitzel, Virginia Bar 68684

The following co-workers agree with my comments and asked that I include them on this letter:

Sara Bieker, Virginia Bar 74039

Lisa Harwood, Virginia Bar 32359

Helen Randolph, Virginia Bar 26627

Allison Carpenter, Virginia Bar 76579



From: mwg@lawglg.com [mailto:mwg@lawglg.com]
Sent: Sunday, January 13, 2013 8:41 PM
To: Gould, Karen
Cc: David Bernhard
Subject: Comment on proposed changes to Rule 3A:11

Ms. Gould,

I write in support of Mr. Bernhard's comments to the proposed changes to Rule 3A:11. I believe his assessment of the current state of discovery in the Commonwealth of Virginia, and the proposed modifications to the rule are incisive and accurate. The changes to the discovery rule as endorsed by Mr. Bernhard should be considered and adopted in their entirety.

Thank you for your kind attention to this matter.

Sincerely,

Matt Greene

Matthew W. Greene, Esquire
Greene Law Group, PLLC
3977 Chain Bridge Road, Suite 1
Fairfax, VA 22030
T 703.546.4660
F 703.995.0399





**Coalition Against Domestic Violence
for the 24th Judicial District**

P.O. Box 236
Rustburg, VA 24588
(434) 332-9520
www.cadv-24.org



Karen A. Gould, Executive Director
Virginia State Bar
707 E. Main Street, Suite 1500
Richmond, VA 23219

**Re: Public comment concerning proposed rule change to
Virginia Rule of Court 3A:11**

Dear Ms. Gould:

Please allow this letter to serve as the position of the Coalition Against Domestic Violence for the 24th Judicial District ("The Coalition") in the matter of the Indigent Defense Task Force's ("IDTF") draft of a proposed new rule concerning discovery in criminal cases. Thank you for your time and the opportunity to comment on this proposed rule change.

The Coalition is a regional membership coalition made up of a diverse group of agencies and concerned citizens dedicated to providing leadership in the prevention of domestic violence and responding to instances of domestic violence occurring on our community. Members of this coalition include victim advocates, commonwealth attorneys, law enforcement, forensic nurses, mental health therapists and advocates, and sexual assault response personnel.

We object to the proposed changes to Rule 3A:11 as it would detrimentally impact victim and witness safety as well as their willingness to cooperate in the report, investigation and prosecution of domestic violence and sexual assault cases. We have grave concerns this rule change will have a chilling effect on victims and witnesses in these cases.

Tonya Mays,
Chair
*Campbell County
Victim-Witness Director*

Bethany Harrison,
First Vice-Chair
*Assistant Commonwealth
Attorney
City of Lynchburg*

Lindsey Scott,
Second Vice-Chair
*SARP
Central Virginia*

Summer Tetterton,
Treasurer
*CSA Coordinator
Campbell County*

Lorna Rexrode
Secretary
*CASA
City of Lynchburg*

RECEIVED

JAN 14 2013

The proposed rule change would require that all statements and identifying information of a victim or witness be given to the defendant. There is a provision in the drafted rule change allowing for the Commonwealth to withhold that information if necessary to protect the safety of the witness and his or her family. However, a defendant may petition the court to get the identifying information despite these safety concerns. There are no procedural guidelines for how a defendant may get this information or a standard set that he must meet for the court to order this.

The defendant certainly has a right to confront his accusers and that is the current law. Adding in this provision requiring victim and witness addresses be made known to the defendant when they have concerns for their safety is dangerous. Victims of domestic violence who relocate and want to get away from their abuser do not want the abuser to find them. The same goes for victims of sexual assault who have suffered one of the most invasive violations of their person.

The current law requires prosecutors to give exculpatory information to the defendant. If a witness or victim makes a statement that is given in confidence to the prosecutor or one of her agents that is not exculpatory, there is no need to require the prosecutor to allow inspections of these statements. Victims and witnesses are currently told their statements are confidential with the noted exception for exculpatory information. If a victim or witness is aware that all statements he or she makes will be made available to the defendant, it is our concern this will cause many victims and witnesses to withhold relevant information, not report crimes, or participate in the investigation or prosecution.

As the proposed rule change stands, it is too vague and broad regarding the release of victim and witness identifying information and statements. These changes are unnecessary and have a great potential to silence victims and witnesses.

Thank you for the ability to address our concerns regarding the IDTF's proposed 3A:11 rule change. If you have any questions, please call me at the number above.

Sincerely,

Tonya Mays, Chair
Coalition Against Domestic Violence for the 24th Judicial District